(20,464.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 499.

[illegible]RY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a

No. 1336.

United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the District of Montana.

1 In the Circuit Court of the United States, Ninth Circuit, District of Montana. In Equity.

No. 747.

THE UNITED STATES OF AMERICA, Complainant,
vs.
MOSE ANDERSON ET AL., Defendants.

Caption.

Be it remembered, that on the 26th day of June, A. D. 1905, the complainant filed its bill of complaint herein, which said bill of complaint is entered of final record herein as follows, to wit:

2 In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.
MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, —— CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY (a Corporation), Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Ninth Circuit in and for the District of Montana, in Equity:

The United States of America, your orator, by Carl Rasch,
3 United States Attorney for the District of Montana, for and in its own behalf, and for and in behalf of its wards, the

Indians residing upon the Fort Belknap Indian Reservation in the State and District of Montana, files this bill of complaint against Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, —— Corregan (whose given or Christian name is to your orator unknown), and W. M. Williams, residents of the State and District of Montana, the Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, defendants herein, and thereupon your orator complains and says:

First.

That the said defendant, Matheson Ditch Company, ever since the 13th day of April, A. D. 1899, has been, and at the time of the commission of the wrongs and grievances hereinafter complained of, was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and is doing business in said State and District of Montana.

Second.

That the said defendant, Cook's Irrigation Company,
4 ever since the 13th day of May, A. D. 1896, has been, and at the time of the commission of the wrongs and grievances hereinafter complained of, was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and is doing business in said State and District of Montana.

Third.

That the said defendant, Empire Cattle Company, ever since the 23d day of June, A. D. 1897, has been, and at the time of the commission of the wrongs and grievances hereinafter complained of was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and doing business in said State and District of Montana.

Fourth.

That heretofore, to wit, on or about the 1st day of May, A. D. 1888, a large tract of land situate within the northern part of the then Territory, now State of Montana, and then and there and thereafter, and at all times hereinafter mentioned, the property of your orator, the said United States, was reserved and set apart by the said United States as an Indian Reservation as and for the permanent home and abiding place of the Gros Ventre and Assinniboine bands or tribes of Indians in the State (then Territory) of Montana,
5 designated and known as the Fort Belknap Indian Reservation; that the said Indian Reservation is now situated in the county of Choteau, in the State and District of Montana, and its

boundaries were at the said time of the creation of said reservation fixed and defined as follows, to wit:

Beginning at a point in the middle of the main channel of Milk river, opposite the mouth of Snake creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk river opposite the mouth of People's creek; thence up Milk river, in the middle of the main channel thereof, to the place of beginning.

That ever since the said 1st day of May, A. D. 1888, the said aforementioned and described tract of land has been, and the same is now an Indian Reservation, and the property of your orator subject to the occupancy of the said bands or tribes of Indians, and the same ever since the 1st day of May, A. D. 1888 has been and is now occupied and inhabited by the said bands or tribes of Indians as and for their permanent home and abiding place.

6 Fifth.

That the said Fort Belknap Indian Reservation extends to the middle of the main channel of said Milk river, which said river is a non-navigable stream and water course, the said line in the middle of the main channel of said Milk river being the northern boundary line of said reservation. That large portions of the lands embraced within said reservation are well fitted and adapted for pasturage and the grazing and feeding thereon of stock and horses and cattle. That other large portions of said reservation are adapted for, and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of crops of grass, grain, and vegetables. That ever since the establishment of said Indian reservation large herds of cattle, the property of your orator and of the Indians residing upon said reservation, and large numbers of horses, the property of said Indians, have been and are now feeding, pasturing and grazing upon said reservation, and upon the lands within said reservation being and situate along and bordering upon said Milk river.

Sixth.

That such portions of the said Fort Belknap Indian reservation as are adapted and fitted for farming and cultivation and the
7 pursuits of agriculture thereon, as aforesaid, are of a dry and arid character, and in order to make the same productive, and for the purpose of successfully raising thereon crops of grain, grass, and vegetables, require large quantities of water for the purpose of irrigating the same. That without water for the irrigation of said lands, the same would be and remain unproductive, and it would be impossible to successfully raise upon said lands crops of grain, grass and vegetables. That heretofore, in the year 1889, your orator erected and constructed houses and buildings upon said

reservation for the occupancy and residence of the United States Indian Agent and the officers of your orator having the charge and superintendency of said reservation and the Indians residing thereon, generally known as the Fort Belknap Agency, and ever since the said year 1889 the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of your orator having charge and superintendency of said reservation. That the said agency depends entirely for its water supply for domestic, culinary and irrigation purposes upon the waters of the said Milk river, and that at all times, ever since the erection of said houses and buildings and the establishment of said agency, your orator has been obliged and is now obliged to depend for its water supply for said agency and for the purposes aforesaid upon the waters
8 of said Milk river. That heretofore, and long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to wit, in the year 1889, your orator through its officers and agents at said Fort Belknap Agency, for the purpose of obtaining the requisite amount of water for domestic, culinary and irrigating purposes for said agency appropriated, took and diverted from the channel of said Milk river, by means of pumps, pipes, and waterways, a large amount, to wit, a flow of one thousand miner's inches of the water of said Milk river, and by means of pumping the same out of the channel of said Milk river, and by ditches, pipes, and waterways conducted the said waters of said river, so taken and diverted from said river as aforesaid, from the channel of said river to the said agency buildings and premises, and after so conducting the said waters to said agency buildings and premises, used the same for domestic, household and culinary purposes, and also for the irrigation of lands adjacent to, connected with, and surrounding said agency buildings and premises, and by means of the use of said waters for irrigation purposes, raised upon said premises adjacent to and connected with said agency crops of grain, grass and vegetables. That thereafter, but long prior to the commission by the said defendants of the wrongs and grievances
9 hereinafter complained of, to wit, on the 5th day of July, A. D. 1898, your orator and the Indians residing upon said reservation, for the purpose of bringing and conducting water to and upon the lands of said Fort Belknap Indian Reservation with which to irrigate the same and raise thereon crops of grain, grass, and vegetables, appropriated, took and diverted from the channel of said Milk river, by means of canals, ditches and waterways, additional large amounts of the waters of said Milk river, to wit, a flow of ten thousand miner's inches of the waters of said river, and by means of canals, ditches and waterways conducted the water of said river, so taken and diverted from the said river as aforesaid, from the channel of said river to and upon divers and extensive tracts of land upon said reservation aggregating in amount about thirty thousand acres of land, and after so conducting said waters to and upon said lands used the same for irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands, crops of grain, grass and vegetables.

That ever since the said year 1889, and down to the time of the commission of the wrongs and grievances committed by the said defendants as hereinafter set out and complained of, your orator and its officers and agents residing at said agency, have constantly, and uninterruptedly used and enjoyed the said waters of said
10 Milk river so taken and diverted as aforesaid in the year 1889, at and upon said agency for domestic, culinary and household purposes, and for the irrigation of the lands and premises adjacent to and connected with said agency, and for raising upon said premises crops of grain, grass and vegetables, and ever since the said year 1898, and down to the time of the commission of the wrongs and grievances by the said defendants hereinafter set out and complained of, your orators and its officers and agents and the said Indians residing upon the said reservation as aforesaid, have continuously and uninterruptedly used and enjoyed the said waters of said Milk river so appropriated, taken and diverted as aforesaid, on the 5th day of July, 1898, upon said lands embraced within said reservation for irrigating, domestic and other useful purposes, and by means of said waters so taken and diverted from said Milk river, and used by your orator and the said Indians residing thereon as aforesaid, have raised upon said lands crops of grain, grass and vegetables and carried on agricultural pursuits, and your orator has been enabled by means thereof to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement.

Seventh.

11 And your orator further showeth unto your Honors that large tracts of land within said Fort Belknap Indian Reservation, being and situate along and contiguous to the channel of said Milk river, are used by your orator from year to year for the pasturing, feeding, raising, and grazing of livestock, principally horses and cattle, the property of your orator and said Indians residing upon said reservation. That in order to enable your orator and said Indians to successfully and properly pasture, and feed said horses and cattle upon said lands, it is necessary and essential that the waters of said Milk river should be permitted to flow down the channel of said river, to supply and furnish said stock with drinking water. That unless the waters of said river are permitted to flow down the channel of said river, the said cattle and horses, so pasturing and feeding upon said lands, will be deprived of water necessary for drinking purposes, and will render valueless for grazing, feeding and ranging purposes large tracts of lands within said reservation, situate along and contiguous to the channel of said Milk river.

Eighth.

And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated and diverted from the channel of said Milk river as aforesaid, are essential and neces-

sary for the use of your orator at the agency on said Fort
12 Belknap Indian Reservation for household, domestic and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said bands and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive for the raising thereon of crops of grain, grass and vegetables, large quantities of water flowing in said Milk river will be required and necessary for the purpose of irrigation of the said lands within said reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians,
13 and to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stockraising as aforesaid, it is essential and necessary that all of the waters of said Milk river should be permitted to flow down the channel of said river, uninterruptedly and undiminished in quantity, and undeteriorated in quality.

Ninth.

And your orator further showeth unto your Honors, that notwithstanding the riparian and other rights of your orator and of the said Indians to the uninterrupted flow of all the waters of said Milk river, as aforesaid, down the natural channel of said river, the said defendants, heretofore, to wit, in the year 1900, wrongfully and unlawfully, and without the license, consent or approval and against the wishes of your orator, and of the said Indians and without the license, consent or approval and against the wishes of the Secretary of the Interior of the said United States, and in utter disregard of the rights of your orator and the Indians residing upon the said Fort Belknap Reservation, entered upon the said Milk river and its tributaries above the points of diversion of the said waters of said river by your orator and said Indians, as aforesaid, and above the places of use of said waters by
14 your orator and said Indians, and built, erected, and constructed in and across the channel of said Milk river and its tributaries, large and substantial dams and reservoirs and by means of said dams and reservoirs impeded, obstructed and prevented the waters of said Milk river and its tributaries from flowing down

the natural channel of said river to the places of your orator's points of diversion and use of the said waters of the said river. That by means of said dams and reservoirs and by means of canals, ditches and waterways, made and constructed wrongfully and unlawfully and without the license, consent, or approval of the Secretary of the Interior, over and through the public lands of your orator, by the said defendants, said defendants appropriated, took, and diverted all of the waters of the said Milk river and its tributaries out of and away from the channel of said river and its tributaries, and by means of said canals, ditches, and waterways, conducted and conveyed the same long distances away from the channel of said Milk river and its tributaries, and away from the said Fort Belknap Indian Reservation. That by means of said dams and reservoirs and said canals, ditches and waterways said defendants prevent any of the waters of said Milk river and its tributaries from flowing down the channel of said river to your orator's points of diversion and places of use of said waters, and wholly deprived your
15 orator and the Indians residing upon said reservation of the use of the waters of said river, all of which said acting and doings as aforesaid, of the said defendants was without the license, consent or approval of your orator, the said United States, and without the license, consent or approval of the Secretary of the Interior of the said United States.

Tenth.

And your orator further charges and says that ever since the said year 1900, the said defendants have been and are now, wrongfully and unlawfully and without right or authority, maintaining said dams and reservoirs, and have been and are now, by means of said canals, ditches, and waterways, wrongfully and unlawfully, and without right or authority, appropriating, taking, and diverting all of the waters of said Milk river and its tributaries out of and away from the channel of said river, and ever since said year 1900, have been, and now are, wrongfully and unlawfully, and without right or authority, conducting and conveying the said waters of said river and its tributaries by means of said canals, ditches and waterways, over and through the public lands of your orator long distances away from the channel of said river and from the said Indian reservation, thereby impeding, obstructing, and preventing the waters of said river from flowing down the natural channel of said river to your orator's said points of diversion and
16 places of use, and ever since the said year 1900, have been, and are now, wrongfully and unlawfully, depriving your orator and the said Indians, residing upon the said Fort Belknap Indian Reservation, of the use of the said waters of said river and its tributaries for irrigating, stockraising, domestic and all other useful purposes, all of which acting and doings of the said defendants was and is without the license, consent, or approval of your orator, and without the license, consent, or approval of the Secretary of the Interior, and in utter disregard and contempt of the rights of your orator in the premises.

Eleventh.

That the said defendants impede, obstruct, and prevent the flow of the waters of said Milk river down the channel of said river, as aforesaid, and take and divert the waters of said river and its tributaries from the natural channel of said river and its tributaries as aforesaid, and said defendants intend, and threaten to continue and will continue to do so, to the great and irreparable damage and injury of your orator, unless the said defendants are restrained and enjoined from so doing by the order and decree of this Court. That your orator has no plain, speedy, and adequate remedy at law, and that unless the said defendants are restrained and enjoined from in any manner impeding, obstructing or
17 preventing the waters of said Milk river from flowing down the channel of said river to the places of your orator's use of said waters, your orator will suffer great and irreparable injury.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, and make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, and direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

May it please the Court to grant to your orator a writ of injunction, issued out of and under the seal of this court, directed to the said defendants, Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris. Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, —— Corregan, W. M. Williams, Matheson Ditch Company, Cook's Irrigation Company, and Empire Cattle Company, perpetually and forever enjoining and restraining said defendants, and each of them, and their attorneys, officers, agents, servants, and em-
18 ployees, and all persons whomsoever, acting by, through, or under said defendants, or any or either of them, from in any manner constructing, erecting, keeping up, or maintaining any dams or reservoirs, of any kind or character in or across the channel of said Milk river or its tributaries, and from in any manner impeding, obstructing or preventing the waters of said Milk river or its tributaries from flowing down the channel of said river down to your orator's places of use, and perpetually and forever enjoining and restraining said defendants, and each of them, their attorneys, agents, servants, and employees, and all persons acting by, through, or under them or any or either of them, from in any manner interfering with the flow of the waters of said Milk river or its tributaries, and taking and conducting the same from and out of the channel of said river, or its tributaries, and that a temporary restraining order and injunction may issue, enjoining the said defendants and each of them, and all persons acting by, through, or under them, or any or either of them, from the commission of any

of the acts herein complained of during the pendency of this suit.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to the said defendants, Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie
19 Gannaway, Kit Leonard, Chris. Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, —— Corregan, W. M. Williams, Matheson Ditch Company, Cook's Irrigation Company, and Empire Cattle Company, therein and thereby commanding them and each of them, on a day certain, to appear and answer unto this bill of complaint, but not under oath, and answer under oath being expressly waived, and then and there to abide and perform such order and decree as the Court shall make in the premises, and as shall be agreeable to equity and good conscience, and in accordance with the rules and practice of this Court.

CARL RASCH,
United States Attorney, and of Counsel for Complainant.

UNITED STATES OF AMERICA, *District of Montana, ss:*

Carl Rasch, being first duly sworn, deposes and says that he is the regularly appointed, qualified and acting United States Attorney in and for the District of Montana, that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

CARL RASCH.

20 Subscribed and sworn to before me this 26 day of June, A. D. 1905.

[SEAL.] GEO. W. SPROULE,
Clerk U. S. Circuit Court, Dist. of Mont.

[Endorsed:] Title of Court and Cause. Bill of Complaint. Filed and Entered June 26, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of June, A. D. 1905, a subpœna in equity was duly issued herein, which said subpœna in equity is entered of final record as follows, to wit:

Subpœna Ad Respondendum.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

The President of the United States of America, Greeting, to Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Grannaway, Kit Leonard, Chris. Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, —— Corregan, W. M. Williams, Matheson Ditch Company, a Corporation, Cook's Irrigation Company, a Corporation, and Empire Cattle Company, a Corporation, Defendants:

You are hereby commanded, that you be and appear in
21 said Circuit Court of the United States aforesaid, at the court-room in Helena, Montana, on the 7th day of August, A. D. 1905, to answer a bill of complaint exhibited against you in said court by The United States of America, complainant, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of June, in the year of our Lord one thousand nine hundred and five and of our Independence the 129th.

[SEAL.] GEO. W. SPROULE, *Clerk.*
By —— ——, *Deputy Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

[SEAL.] GEO. W. SPROULE, *Clerk,*
By —— ——, *Deputy Clerk.*

CARL RASCH,
U. S. Att'y, Solicitor for Complainant, Helena, Montana.

22 UNITED STATES MARSHAL'S OFFICE, DISTRICT OF MONTANA.

I hereby certify that I received the within writ on the 26th day of June, 1905, and personally served the same on the 29 and 30 day of June and 1st to 5th July, 1905, by delivering to, and leaving with Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Chris. Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, —— Corregan, Wm. Williams, Matheson Ditch

Co., Cook's Irrigation Co., and Empire Cattle Co., and L. Ereaux, July 3d, 1905, said defendant named therein personally, along Milk river in the county of Chouteau, in said District, a copy thereof.

July 17th, 1905.

C. F. LLOYD,
U. S. Marshal,
By GEO. E. YOUNG, *Deputy.*

[Endorsed:] No. 747. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. The United States of America *vs.* Mose Anderson *et al.* Subpœna. Filed July 17th, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

23 And after, to wit, on the 5th day of March, A. D. 1906, the answer of defendants Henry Winters *et al.* was duly filed herein, which said answer is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.
MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY (a Corporation), Defendants.

Answer of Henry Winters et al.

24 The joint and several answer of the defendants Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation.

I.

These defendants respectively now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as these defendants are advised is material or necessary for them to make answer to, jointly and severally answering, say:

First. We admit the allegations contained in paragraphs numbered first, second, third, fourth and fifth, both inclusive, of complainant's bill of complaint.

Second. That as to the allegations of paragraph six, we admit that the lands upon the said Indian Reservation adapted for farming and cultivation are of a dry and arid character, and require large quantities of water for the purpose of irrigating the same to make the same productive. We admit that in the year 1889, the complainant erected and constructed houses and buildings upon the said reservation for the occupancy and residence of the United States
25 Indian Agent and officers of complainant having the charge and superintendency of the said reservation, and of the Indians residing thereon, and that ever since the said year 1889 the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of the complainant having charge of said reservation. We admit that in the year 1889, the complainant through its officers and agents at said Fort Belknap Indian Agency appropriated, took and diverted from the channel of Milk river by means of pumps, pipes and waterways a large amount of the waters of said Milk river, and diverted the same from the channel of said river to the said agency buildings and premises, and that the complainant has used the same for domestic, household and culinary purposes, and has irrigated lands adjacent to the said agency buildings since said time. But we deny that the complainant at that time or at any other time appropriated, took or diverted a flow of one thousand miner's inches of the waters of said Milk river, or any greater amount in the year 1889 than one hundred inches. We admit that afterwards in the year 1893 or 1894, the complainant took for the said purposes additional waters of the said Milk river amounting to about one hundred and fifty inches, making a total amount so taken and appropriated by the complainant
26 for the purposes of supplying the said agency buildings and premises, of not to exceed two hundred and fifty inches. We admit that on or about the 5th day of July, 1898, the complainant appropriated, took and diverted from the channel of the said Milk river by means of canals, ditches and waterways for the purpose of irrigating lands upon the Fort Belknap Indian Reservation, a large amount of the water of said Milk river, but deny that the complainant took a flow of ten thousand inches of the said waters or any greater amount than five thousand inches of the waters of the said river. We admit that since the year 1889, the complainant and its officers and agents have used the waters of the said Milk river at and upon said agency for domestic, culinary and household purposes and for the irrigation of lands adjacent to and connected with the agency to the extent of two hundred and fifty inches, and that since the year 1898 the complainant and its officers and agents have taken and used of the waters of Milk river a large amount, not exceeding five thousand inches for the purpose of irrigating lands upon the said reservation, but allege that whatever use of the said waters has been made by the complainant, its officers and agents upon the said Indian Reservation, has been subordinate and subject to the rights

of these defendants to the use of the waters of Milk river as hereinafter set forth.

27 Third. That as to the allegations of paragraph nine, these defendants admit that they have severally built, erected and constructed in and across the channel of Milk river and its tributaries substantial dams and reservoirs for the purpose of preventing certain of the waters of said Milk river from flowing down in the natural channel of said river to the place of diversion and use of the said waters by the complainant. But deny that the said acts of these defendants or any of them were wrongful or unlawful, but aver that they were each and all done under a claim of right as hereinafter set forth. Defendants admit the appropriation, taking and diverting the waters of the said Milk river, and its tributaries out of and away from the channel of said river, but deny that the said appropriation, taking and diverting was wrongful or unlawful, but on the contrary aver that the appropriation, taking and diversion by these defendants was done pursuant to the laws of the United States, the State of Montana, and the decisions of the Courts and under a claim of right as hereinafter more specifically set forth.

Fourth. Deny that during the year 1900, or at any other time, they have been or are now wrongfully, unlawfully or without right or authority, maintaining said dams and reservoirs, or by means of said canals, ditches or waterways, wrongfully, unlawfully, or without right or authority, appropriating, taking or diverting the

28 waters of said Milk river or its tributaries, away from the channel of said river, or that they have been, or now are wrongfully, unlawfully or without right or authority conducting or conveying the waters of said Milk river or its tributaries, or, by means of the canals, ditches and waterways, through the public lands of the United States, are thereby impeding or obstructing the waters of said Milk river from flowing down the channel of said river to the point of diversion aforesaid; but admit that during the year 1900, and at other times hereinafter set forth, they have been maintaining, and now are maintaining dams and reservoirs in the channel of said Milk river and its tributaries, and by means of the canals, ditches and waterways, constructed through the public lands of the United States, and other lands, conveyed said waters of said river and its tributaries through said ditches away from the channel of said river, and thereby impeded, obstructed and prevented some of the waters of said Milk river from flowing down the natural channel thereof to the point of diversion mentioned in the complaint, and aver that the said acts were lawfully done, under a claim of right, as hereinafter more fully set forth.

II.

And as a further answer to said bill of complaint, and by way of further defense thereto, these defendants show unto your

29 Honors that the claim of the plaintiff and the Indians upon said Fort Belknap Reservation to the waters of said Milk river, as against the claims of these defendants herein is inequitable, unjust and without right in this:

First. That prior to the first day of May, 1888, all that part of the State of Montana, lying north of the line bounded by the Missouri river, up to the Marias river, thence up the Marias river to Birch creek; thence up Birch creek to its source; thence west to the crest of the Rocky Mountains, including the Milk river and the lands occupied by these defendants, and also the lands embraced in the Fort Belknap Indian Reservation, described in the bill of complaint, was by the Act of Congress approved April 15th, 1874, set apart and reserved for the use and occupation of the Gros Ventre Piegan, Blood, Blackfeet and River Crow and other Indians that the President might wish to place upon said reservation; but that such right was the bare right of the use and occupancy thereof at the will and sufferance of the Government of the United States. That the Government of the United States, for the purpose, and with the intent of opening for settlement a large portion of the lands embraced within the said reservation hereinbefore described and particularly set forth and described in the Act of Congress, approved April 15, 1874, made and entered into an agreement with the Indians, composing the tribe- of Gros Ventres, Piegan, Blood, Blackfeet and River Crow Indians, wherein and whereby the said Indians, for a valuable consideration, relinquished, ceded, sold, transferred and conveyed to the Government of the United States all of their right, title, claim and interest in and to all of said lands included in said reservation theretofore used and occupied by them, excepting the lands included in the Fort Belknap Indian Reservation, described in the Bill of Complaint, and those included in the Fort Peck and the Blackfeet Reservations, and the said Indians thereafter did not have any right, title, claim or interest in or to the lands thus relinquished, ceded and conveyed to the Government of the United States, or to the waters flowing thereon. That the said agreement with the said Indians was thereafter, by the Act of Congress approved May 1st, 1888, ratified, affirmed and approved, and it was by the said Act declared and provided that the lands to which the Indians' title was thus extinguished were a part of the public domain of the United States, open and subject to enrty and settlement under the provisions of the laws regulating homestead entries, excepting section 2301 of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands and mineral lands; and the lands thus ceded and relinquished by the Indians, and so declared by the Act of Congress to be a part of the public domain, then became and were a part of the public domain of the United States, and it was the purpose and intent of the Government that the said lands should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed and cultivated, and communities of civilized persons be established thereon.

Second. And these defendants further show unto your Honors that these defendants, who are individuals, are each and every of them, and their grantors and predecessors in interest were citizens of the United States, over the age of twenty-one years, and qualified to enter upon and acquire title to the public lands of the United

States open to entry under the Homestead and Desert land laws. That the defendants, Matheson Ditch Company and Cook's Irrigation Company are and were, at all times in said Bill of Complaint, and hereinafter mentioned, corporations, organized and existing under the laws of the State of Montana, for the purpose of supplying to their stockholders the waters of the said Milk river and its tributaries, to be used by their said stockholders in the irrigation of the lands so owned and possessed by the said stockholders. That during all the times in said bill of complaint mentioned, the said stockholders of each of said corporations and all of them were
32 citizens of the United States, over the age of twenty-one years, and qualified to become settlers upon the public lands of the United States and to acquire title thereto, under the homestead and desert land laws of the United States.

That the defendant Empire Cattle Company is, and at all times hereinafter mentioned was a corporation, organized and existing under the laws of the State of Montana, and authorized by such laws to acquire title by purchase to lands, tenements and hereditaments, together with all appurtenances usually connected therewith, and that said Empire Cattle Company is by purchase the owner and holder of certain lands bordering upon the said Milk river and its tributaries, purchased from persons who had acquired title thereto under the homestead and desert land laws of the United States, and that each of the grantors of the said Empire Cattle Company were, at the time of the acquisition of such title, citizens of the United States, over the age of twenty-one years and qualified to acquire title to the said lands under the Desert and Homestead land laws of the United States.

Third. And these defendants further show unto your Honors that at sundry times after the lands were thus ceded and relinquished by the Indians and declared open for settlement as aforesaid, and prior to the fifth day of July, 1898, and before any appropriation,
33 diversion or use of the waters of Milk river or its tributaries was made by the plaintiff or the said Indians on said Fort Belknap Indian Reservation, excepting a pumping plant of the capacity of about two hundred and fifty miner's inches, the individual defendants herein and the stockholders of the Matheson Ditch Company, and the Cook's Irrigation Company and their grantors and predecessors in interest and the grantors of the Empire Cattle Company, without having any notices or knowledge that there was any claim made by the plaintiff herein, or the Indians on said Fort Belknap Indian Reservation that there was any reservation made of the waters of said Milk river or its tributaries for use on said reservation, and believing that all waters on the said lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the laws, decisions, rules and customs of the State of Montana in like manner as waters on other portions of the public domain, entered upon the said public lands of the United States in the vicinity of Milk river, being a part of the public lands of the United States to which the Indians aforesaid had relinquished, ceded and conveyed to the Government of the United States all their right,

title and interest, and which were thrown open to settlement by the Government pursuant to the act of Congress, approved May 1, 1888, as aforesaid, and each respectively, made entry at the United
34 States Land Office for certain portions of the said public lands and thereafter settled upon, improved, reclaimed and cultivated the same, and performed all things required to be performed by the laws of the United States relative to the acquisition of title to lands under the homestead and desert land laws of the United States, and in all things complied with the provisions of said laws, and thereafter made due proof before the United States Land Office of the performance of all things to be by them performed under the said laws, and a compliance with all the rules and regulations prescribed by the Secretary of the Interior, and thereupon the Government of the United States issued to them each respectively, a patent wherein and whereby the said Government conveyed to them respectively in fee simple the lands thus entered, settled upon, cultivated and reclaimed as aforesaid.

That all of the said lands are situated within the watershed of the said Milk river, and are riparian lands, situated upon the said Milk river and its tributaries, and all said lands are arid agricultural lands, and for the purpose of reclaiming the said lands and making the same *inhabitants* and capable of growing crops thereon, it is necessary that said lands be irrigated by artificial means, and without such irrigation the said lands cannot be reclaimed, would not be inhabitable, and crops could not be successfully cultivated and grown thereon.

35 Fourth. And these defendants further show unto your Honors that, for the purpose of reclaiming said lands, and making the same inhabitable, and for the purpose of cultivating and growing crops thereon, the individual defendants herein, or their predecessors in interest, and the stockholders of the Matheson Ditch Company and the Cook's Irrigation Company, and the grantors and predecessors in interest of the defendant, Empire Cattle Company, each for the purpose of, and intending to divert and appropriate waters of said Milk river and its tributaries, for the purpose of irrigating their respective lands aforesaid, acting under the laws of the United States and the laws of the State of Montana, the decisions of its Courts and the rules and customs of the country, posted upon said Milk river and its tributaries at the respective points of intended diversion, notices respectively setting forth the number of inches claimed, the purpose for which it was claimed, the place of intended use, the means of diversion, with the size of the flume, ditch or pipe by which he intended to divert it, the date of the appropriation, the names of the appropriators, and within twenty days thereafter filed in the office of the clerk and recorder of the county wherein the said lands are situated, a copy of the said notices, duly verified, and within forty days thereafter commenced the construction of their respective ditches, with the neces-
36 sary dams and reservoirs, and prosecuted the work thereon with diligence until the same was completed, and thereby diverted, appropriated, conveyed and applied to a beneficial use

large quantities of the waters of said Milk river and its tributaries, to wit, more than five thousand miner's inches or one hundred and twenty cubic feet per second, all of which said waters were so diverted and appropriated prior to the first day of July, 1898, and, at all times since, up to the time of issuing of the injunction herein, were used by these defendants and the stockholders of the said Matheson Ditch Company and Cook's Irrigating Company in irrigating their said lands and producing hay, grain and other crops thereon, and for household and other domestic purposes.

That the lands owned and occupied by the stockholders of the defendant, Cook's Irrigation Company, which stockholders are about twenty-eight in number, and the lands owned and occupied by the stockholders of the Matheson Ditch Company, which stockholders are about fifteen in number, are so situated that the waters can be more economically conveyed through a separate ditch for each corporation, and then distributed to the several tracts owned by the respective stockholders, by laterals connected therewith, and

37 for the purpose of using said waters economically, and for the purpose of constructing a ditch to convey waters to the said lands, the said stockholders of the Cook's Irrigation Company organized a corporation of the defendant Cook's Irrigation Company, for the purpose of constructing and maintaining an irrigation ditch to reclaim and irrigate the lands of the said stockholders, so occupied by them; and the stockholders of the Matheson Ditch Company organized the corporation of the Matheson Ditch Company for the purpose of constructing and maintaining an irrigating ditch to convey waters to, and reclaim and irrigate the lands of the said stockholders, so occupied by them, and the rights of the said respective stockholders are determined by the amount of water appropriated by them, and the amount of stock owned by them in the respective corporation, and ever since the Cook's Irrigation Company and the Matheson Ditch Company have been, and up to the time of issuing of the temporary injunction herein, were engaged in the business of carrying and conducting the said waters of said Milk river and its tributaries, through their respective ditches aforesaid, to the lands owned and occupied by their respective stockholders, which said waters so conveyed were used by the stockholders of said corporations in irrigating their lands, and producing hay, grain and other crops thereon and for household and other domestic purposes.

38 Fifth. And these defendants further show unto your Honors that the defendants herein, and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company have expended many thousands of dollars in constructing said dams, ditches and reservoirs and other work in and about reclaiming said lands, and have expended thousands of dollars in improving said lands, and in building homes, fences, and other structures and establishing schools, and constructing highways, and other improvements usually had and enjoyed in a civilized community, and that the only source of supply for waters to irrigate said lands is from the said Milk river and its tributaries, and if these defendants are

deprived of the use of said waters, their said lands cannot be successfully cultivated, and crops cannot be successfully grown thereon and they will become useless, and homes cannot be maintained thereon. That in addition to the lands occupied by the defendants herein and the stockholders of the Cook's Irrigation Company, and of the Matheson Ditch Company, there are large tracts of land of like character, situated within the watershed of said Milk river and its tributaries, wholly dependent upon the waters of said Milk river and its tributaries for irrigation, and without said waters the said lands cannot be reclaimed, and cannot be successfully cultivated, and homes maintained thereon. That a large number of
39 persons have settled upon said lands, under the land laws of the United States, acquired title thereto, and have reclaimed the same by means of the waters of said Milk river, and its tributaries, and now irrigate and cultivate the same by means of said waters, and that said persons have assisted these defendants in establishing a civilized community in said country, and in building and maintaining churches, schools, villages and other elements and accompaniments of civilization; and said communities consist of thousands of people who are dependent for support upon the successful reclamation and cultivation of said lands, thus thrown open to settlement, and the business and industries arising therefrom, and if the claim of the complainant herein and the Indians to the said waters of said Milk river is maintained, the lands of these defendants and the other settlers herein mentioned will be rendered valueless, the said communities will be broken up or destroyed, and the purpose and object of the Government in opening said lands for settlement will be wholly defeated.

Sixth. And these defendants further show unto your Honors that there are situated upon the said Fort Belknap Indian Reservation a large number of springs, and several streams, from which waters can be obtained for stock and irrigation and particularly these:

40 People's Creek, flowing about 1,000 inches of water,
Big Warm Creek, flowing about 1,000 inches of water,

Lodge Pole Creek, flowing about 600 inches of water, and Clear creek, flowing about 300 inches of water, all of which can be made available for use upon said Reservation and that it was not the purpose or intention of the Government to reserve, for the use of the said Indians, and it did not reserve any of the waters of said Milk river or its tributaries outside of the boundaries of said Reservation, and that all of the said waters were open to appropriation, under the laws, decisions and customs aforesaid.

Seventh. And these defendants further show unto your Honors that the respective claims of these defendants to the waters of said Milk river and its tributaries are prior and paramount to the claims of the plaintiff or the Indians residing upon said Fort Belknap Reservation, excepting the amount of 250 inches of water used in and around the said Agency buildings, and that at all times there has been a sufficient quantity of water flowing down the channel of

said Milk river, to the plaintiff's point of diversion, to more than supply the said 250 inches.

41 Eighth. And defendants further show unto your Honors that the use of the waters of said Milk river and its tributaries are necessary and indispensable to these defendants and the stockholders of the Cook's Irrigation Company and the Matheson Ditch Company in irrigating and cultivating their lands and maintaining their homes thereon, and are of great value to them, to wit, a value of more than $100,000; and if the claim of the plaintiff and the Indians thereto is sustained and these defendants and the said stockholders are deprived thereof their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but it will greatly exceed $100,000.00, and these defendants will be wholly without remedy.

Wherefore, these defendants having fully answered confessed, traversed, and avoided or denied all the matters in the said bill of complaint material to be answered according to their best knowledge and belief, humbly pray your Honors to enter the decree of this Court that these defendants respectively be hence dismissed with their reasonable costs and charges in this behalf reasonably sustained, and for such other and further relief in the premises as to

42 this Honorable Court may seem meet and in accordance with equity.

Dated Mar. 4, 1906.

CARPENTER, DAY & CARPENTER,
WALSH & NEWMAN,

Solicitors and Counsel for the Defendants, Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a Corporation, Cook's Irrigation Company, a Corporation, and the Empire Cattle Company, a Corporation.

Service of the foregoing accepted and copy received this 5th day of March, 1906.

CARL RASCH,
Attorney for United States.

[Endorsed:] Title of Court and Cause. Answer of Henry Winters *et al.* Filed March 5th, 1906. Geo. W. Sproule, Clerk.

43 And thereafter, to wit, on the 12th day of March, A. D. 1906, an order *pro confesso* was duly filed and entered herein, which said order *pro confesso* is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA, Complainant,

vs.

MOSE ANDERSON ET AL., Defendants.

Order Pro Confesso.

It appearing that the subpœna issued in the above-entitled cause was duly and regularly served by the United States Marshal for the District of Montana upon each of the following defendants, to wit: Mose Anderson, Louden Minugh, Minnie Gannaway, L. Ereaux, and W. M. Williams, on and prior to the 5th day of July, A. D. 1905, and more than twenty days before the return day thereof, and it further appearing that the said defendants and each of them have failed to appear in this suit, either in person or by solicitor;

44 Now, therefore, on motion of Carl Rasch, United States Attorney in and for the District of Montana, solicitor for complainant, it is ordered that the bill of complaint in said cause be taken *pro confesso* as to said defendants Mose Anderson, Louden Minough, Minnie Gannaway, L. Ereaux, and W. M. Williams, in accordance with the rules in such case, made and provided.

Dated March 12, 1906.

CARL RASCH,
U. S. Attorney and Solicitor for Complainant.

[Endorsed:] Title of Court and Cause. Order *Pro Confesso*. Filed and Entered, Mar. 12, 1906. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

45 And thereafter, to wit, on the 21st day of April, A. D. 1906, a final decree was duly made and entered herein, which said final decree is entered of final record herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE UNITED STATES OF AMERICA, Complainant,

vs.

MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY (a Corporation), Defendants.

Decree.

This cause came on to be heard on this 21st day of April, A. D. 1906, upon the bill and the joint and several answer of the
46 said defendants Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha

Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation; and it appearing that the bill of equity in said above-entitled cause was filed in this court on the twenty-sixth day of June, A. D. 1905, and that a subpœna was issued and duly served on the said defendants, Mose Anderson, Louden Minugh, Minnie Gannaway, L. Ereaux, and W. M. Williams; that no appearance has been entered by said last-named defendants, or either of them, in person or by solicitor, and that an order taking the said bill *pro confesso* against said last-named defendants Mose Anderson, Louden Minugh, Minnies Gannaway, L. Ereaux, and W. M. Williams, was duly entered on the twelfth day of March, A. D. 1906, in the order book, and that no proceedings have been had or taken by said last named defendants since said order was entered, and more than thirty days having elapsed since the entering of said order taking said bill *pro confesso* as aforesaid.

Now, therefore, upon consideration of the said bill, and the joint and several answer thereto by the said defendants Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs,
47 John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, Cook's Irrigation Company, and the Empire Cattle Company, and by reason of the default of the said defendants Mose Anderson, Louden Minugh, Minnie Gannaway, L. Ereaux, and W. M. Williams, it is by the Court ordered, adjudged and decreed that the general injunction *pendente lite* heretofore granted in this cause against said above named defendants, be, and the same is hereby made perpetual as to five thousand inches of the waters of Milk river, and the said defendants Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, Cook's Irrigation Company, Empire Cattle Company, Mose Anderson, Louden Minugh, Minnie Gannaway, L. Ereaux, and W. M. Williams, and each of them, their, and each of their, agents, attorneys, servants, employees, successors and assigns, and all persons acting by, through, or under them, or any or either of them, are hereby perpetually and forever enjoined and restrained from in any manner taking or diverting the waters of Milk river or its tributaries, and from in any manner or by any means impeding
48 or obstructing the waters of said Milk river or its tributaries so as to prevent the waters of said Milk river and its tributaries to the amount of five thousand inches from flowing down the channel of said Milk river and its tributaries to the complainant's points of diversion and places of use of said five thousand inches of the waters of said Milk river upon the Fort Belknap Indian Reservation in the State and District of Montana; and from in any manner or by any means obstructing or interfering with the free and uninterrupted use and enjoyment of five thousand inches of the waters of said Milk river and its tributaries by the said complainant upon the said Fort

Belknap Indian Reservation, and by the Indians residing thereon, for culinary, domestic and irrigating purposes.

And it is further ordered, adjudged and decreed that the complainant do have and recover from said defendants the costs of this suit, the total amount of such costs to which said complainant is entitled being the sum of four hundred ninety-five 60-100 dollars.

Dated this 21st day of April, 1906.

WILLIAM H. HUNT, *Judge.*

[Endorsed:] Title of Court and Cause. Decree. Filed and entered April 21st, 1906. Geo. W. Sproule, Clerk.

49 *Clerk's Certificate to Enrolled Papers.*

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this court.

Attest my hand and the seal of said Court at Helena, Montana, this 21st day of April, A. D. 1906.

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

[Endorsed:] Title of Court and Cause. Final Record. Filed and Entered April 21st, 1906. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

50 And thereafter, to wit, on the 28th day of April, A. D. 1906, a petition for an order allowing appeal was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA, Complainant,
vs.
MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY, (a Corporation), Defendants.

Petition for Order Allowing Appeal.

Come now the above-named defendants Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, John
51 Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a cor-

poration, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, conceiving themselves to be aggrieved by the decree and order made and entered in the above-entitled cause in the above-entitled court on the 21st day of April, 1906, wherein and whereby it was ordered and decreed that the said defendants and each of them, their and each of their agents, attorneys, servants, employees, successors and assigns, and all persons acting by, through or under them, or any or either of them, be perpetually and forever enjoined and restrained from in any manner taking or diverting the waters of Milk river or its tributaries, and from in any manner or by any means impeding or obstructing the waters of said Milk river or its tributaries so as to prevent the waters of said Milk river and its tributaries to the amount of five thousand inches from flowing down the channel of said Milk river and its tributaries to the complainant's point of diversion and place of use of said five thousand inches of the waters of said Milk river upon the Fort Belknap Indian Reservation in the State and District of Montana; and from in any manner or by any means obstructing or interfering with the free and uninter-
52 rupted use and enjoyment of five thousand inches of the waters of said Milk river and its tributaries by the said complainants upon the said Fort Belknap Indian Reservation and by the Indians residing thereon for culinary, domestic and irrigating purposes, and by which decree and order complainant was awarded a perpetual injunction against said defendants and each of them, and hereby petition said Court for an order allowing said defendants and each of them to prosecute an appeal from said decree and order granting said perpetual injunction to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which said defendants shall give and furnish upon such appeal, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray, etc.

WALSH & NEWMAN AND
CARPENTER, DAY & CARPENTER,
Solicitors and of Counsel for said Defendants.

[Endorsed:] Title of Court and Cause. Petition. Filed April 28, 1906. Geo. W. Sproule, Clerk.

53 And thereafter, to wit, on the 28th day of April, A. D. 1906, the defendants filed their assignment of errors herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA, Complainant,
vs.
MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS. KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. ERRAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY, (a Corporation), Defendants.

Assignment of Errors.

Comes now the defendants whose names are hereunto subscribed and file the following assignment of errors upon which they
54 and each of them will rely upon their appeal from the final decree made by this Honorable Court on the 21st day of April, 1906, granting a perpetual injunction in said cause:

The defendants assign as error upon this appeal the following, to wit:

The Circuit Court erred in making the said decree and order granting a perpetual injunction in this case for the following reasons:

1. The said Circuit Court erred in holding that by the treaty or agreement made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk river to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty or agreement.

2. The said Circuit Court erred in holding that the reservation of the waters of Milk river, if any, contained in the treaty or agreement of May 1, 1888, entered into by the United States, to the Indians residing upon the Fort Belknap Reservation, was binding upon respondents or any of them so as to effect the rights of the respondents to the use of the waters of the tributaries of said Milk river based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the State of
55 Montana and decisions of its Courts, and the customs of the country.

3. The said Circuit Court erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk river were superior to the rights of the respondents or either of them, for the reason that the answer alleges affirmatively that the respondents and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to and in compliance with the laws of the United

States, the laws of the State of Montana and decisions of its courts, and the customs of the country to the extent claimed by them, and there is no sufficient allegation in the bill that there had ever been an appropriation of the said waters or any thereof according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court erred in holding that the rights of the Indians living upon said Reservation to the use of the waters of Milk river were superior to the rights of the respondents, or either of them, for the reason that the answer alleges affirmatively that the respondents and each of them had diverted, appropriated and applied to a useful purpose the waters of said river or its tributaries, according to and in compliance with the laws of the United
56 States, the laws of the State of Montana, and the decisions of its courts, and the customs of the country, to the extent claimed by them, prior to any of the alleged acts of appropriation or diversion of the said waters by the said Indians, or by anyone on their behalf.

5. The said Circuit Court erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these respondents or either of them to the prior right to the use of 5,000 inches of the waters of Milk river, or to the prior right to the use of the said waters at all, except to the extent of 250 inches as admitted in the answer.

In order that the foregoing assignment of errors may be and appear of record the respondent presents the same to the Court and pray that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

WALSH & NEWMAN, AND
CARPENTER, DAY & CARPENTER,
Solicitors and of Counsel for Defendants, Henry Winters, John W. Acker, Chris. Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson
57 *Ditch Company, a Corporation, Cook's Irrigation Company, a Corporation, and Empire Cattle Company, a Corporation.*

[Endorsed:] Title of Court and Cause. Assignment of Errors. Filed April 28, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 28th day of April, A. D. 1906, an order allowing appeal was duly made and entered herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA, Complainant,

vs.

MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS. KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY, (a Corporation), Defendants.

58 *Order Allowing Appeal.*

Upon motion of Messrs. Carpenter, Day & Carpenter, and Walsh & Newman, counsel for defendants, and upon filing the petition of Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, for an order allowing appeal, together with assignment of errors.

It is ordered that an appeal be, and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree and order entered, April 21, 1906, granting a perpetual injunction against respondent herein; that the amount of the bond upon said appeal and supersedeas herein be and is hereby fixed at the sum of ten hundred dollars; and that a certified copy of the records and procedings herein be prepared and transmitted to the said Circuit Court of Appeals.

Dated this 28 day of April, 1906.

WM. H. HUNT, *Judge.*

[Endorsed:] Title of Court and Cause. Order allowing Appeal. Filed and entered, April 28, 1906. Geo. W. Sproule, Clerk.

59 And thereafter, to wit, on the 28th day of April, A. D. 1906, the defendants filed their bond on appeal herein, said bond being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE UNITED STATES OF AMERICA, Complainant,

vs.

MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS. KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY (a Corporation), and EMPIRE CATTLE COMPANY, (a Corporation), Defendants.

Bond on Appeal.

Know all men by these presents, that we, Henry Winters *et al.*, as principals and the United States Fidelity and Guaranty
60 Company, a corporation organized and existing under the laws of the State of Maryland for the purpose of becoming surety upon bonds and obligations required by law, as surety, are jointly and severally held and firmly bound unto the above named complainant, the United States of America in the sum of ten hundred dollars, lawful money of the United States of America to be paid to the United States of America, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of April, A. D. 1906.

The condition of the above obligation is such, that, whereas, the said Henry Winters *et al.*, have taken an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the final decree and order rendered and entered by the Circuit Court of the United States for the Ninth Circuit in and for the District of Montana, which decree and order was made and entered in the above entitled suit on the 21st day of April, A. D. 1906:

Now, therefore, the condition of the above obligation is such, that if the above named Henry Winters *et al.*, appellants herein, shall prosecute said appeal to effect, and answer all damages and
61 costs, if they should fail to make good their plea, then this

obligation shall be void, otherwise to remain in full force and effect.

HENRY WINTERS,
JOHN W. ACKER,
CHRIS KRUSE,
AGNES DOWNS,
THOMAS DOWNS,
JOHN BUCKLEY,
BERTHA RESER,
LYDIA RESER,
EZRA T. RESER,
ANDREW H. RESER,
HENRY CORREGAN,
MATHESON DITCH COMPANY,
A Corporation,
COOK'S IRRIGATION COMPANY,
A Corporation,
EMPIRE CATTLE COMPANY,
A Corporation,
By WALSH & NEWMAN, AND
CARPENTER, DAY & CARPENTER,
Their Attorneys.
THE UNITED STATES FIDELITY AND GUARANTY CO.,
[SEAL.] By GEORGE L. RAMSEY, *Attorney in Fact.*

[Endorsed:] Title of Court and Cause. Bond on Appeal. Filed April 28, 1906. Geo. W. Sproule, Clerk.

The within bond is hereby approved this 28th day of April, 1906.

WILLIAM H. HUNT, *Judge.*

62 And thereafter, to wit, on the 28th day of April, A. D. 1906, a citation was duly issued herein, which said citation is as follows, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California on the 28th day of May, next, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States for the District of Montana, in that certain action number 747, in which Henry Winters and others are defendants and appellants and you are the complainant and appellee, to show cause if any there be, why the final appeal and order made and entered against

the said defendants and appellants as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. H. Hunt, Judge of the
63 United States District Court in and for the District of Montana, sitting as the Circuit Judge, this 28th day of April, 1906.

WILLIAM H. HUNT,
District Judge.

Service of the foregoing citation and receipt of a copy thereof admitted this 28th day of April, 1906.

CARL RASCH,
United States District Attorney, Solicitor for Appellee and Complainant in Lower Court.

[Endorsed:] No. 747. United States Circuit Court, District of Montana. The United States of America, Complainant, *vs.* Mose Anderson *et al.*, Defendants. Citation. Filed and Entered, Apr. 28, 1906. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Montana, ss:*

I, Geo. W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 52 pages, numbered consecutively from 1 to 52, is a true and
64 correct transcript of the pleadings, process, decree, orders, and other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of twenty-two and 65-100 ($22.65) dollars and has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court for the District of Montana, at Helena, Montana, this 16th day of May, A. D. 1906.

[SEAL.] GEO. W. SPROULE, *Clerk.*

[Endorsed:] No. 1336. United States Circuit Court of Appeals for the Ninth Circuit. Henry Winters *et al.*, Appellants, *vs.* The United States of America, Appellee. Transcript of Record Upon Appeal from the United States Circuit Court for the District of Montana. Filed May 22, 1906. F. D. Monckton, Clerk.

65 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1336.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-four (64) pages, numbered from one (1) to sixty-four (64), inclusive, to be a true copy of the printed transcript of record in the above-entitled case upon appeal from the United States Circuit Court for the District of Montana as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 8th day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

66 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1336.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

(Addenda.)

67 At a stated term, to wit: the October term A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Monday the eighteenth day of June in the year of our Lord one thousand, nine hundred and six.

Present: The Honorable William B. Gilbert, Circuit Judge, Honorable Erskine M. Ross, Circuit Judge, Honorable John J. Dehaven, District Judge.

No. 1336.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Order of Submission.

Pursuant to the stipulation of the counsel for the respective parties filed therefor, ordered, appeal submitted to the Court for consideration and decision on briefs.

68 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1336.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Opinion U. S. Circuit Court of Appeals.

E. C. Day, James A. Walsh, Carpenter, Day & Carpenter, and Walsh & Newman for the Appellants.
Carl Rasch for the Appellee.

Before Gilbert and Ross, Circuit Judges, and De Haven, District Judge.

GILBERT, *Circuit Judge*, delivered the opinion of the court:

This is the second appeal in this case. The former appeal was taken from an interlocutory order granting a preliminary injunction *pendente lite* enjoining the appellants from using or in any manner interfering with the use by the Government of the United States or the Indians upon the Fort Belknap Indian Reservation, of 5,000 inches of the waters of Milk River and its tributaries in the District of Montana. Winters *v.* United States, 143 Fed. 740. The present appeal is taken from the final decree entered in said cause upon the bill and answer making the preliminary injunction perpetual. It is admitted that the answer sets forth the same facts that were presented in the affidavits on which the preliminary injunction was granted. We have carefully considered the
69 record and we find that the questions here presented are precisely the questions which were discussed and determined upon the former appeal and that the record brings to our attention no new issues or questions. The appellants cite a case not considered on the former appeal, United States *v.* Choctaw Nation, 179 U. S. 494, and earnestly insist that under the principles there announced, the treaty which is involved in the present case should be construed in accordance with their contention. In that case the

court construed the following provision of a treaty with Indians: "The Choctaws and Chickasaws, in consideration of the sum of $300,000.00 hereby cede to the United States the territory west of the ninety-eighth degree of west longitude known as the Leased District." The contention was that the lands were conveyed in trust but the court held that the treaty made an absolute, unconditional cession to the United States and in the course of the opinion used the following language which is relied upon by the appellants herein: "It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because in the opinion of the court that meaning may, in a particular transaction, work what it would regard as injustice to the Indians," and the court said in substance that if the words of the treaty reasonably interpreted import beyond any question an absolute unconditional cession of lands, free from any trust, the court had not the power to amend the treaty "merely because one party to it held the relation of an inferior and was politically dependent upon the other or because in the judgment of the court the Indians may have been overreached." We think, upon a careful consideration of the authority so cited that it not only does not conflict with the construction which we have placed upon the treaty with the Indians of the Fort Belknap Reservation, but that it is in entire harmony therewith. It affirms the doctrine that the intent of the
70 parties to an Indian treaty should be ascertained by applying the established rules for the interpretation of treaties and that those rules permit the relation between the Indians and the United States to be taken into consideration. Our former decision does not disregard "the obvious palpable meaning of the words of an Indian treaty," nor does it incorporate therein something which is inconsistent with the clear import of its words. It construes and gives effect to what we understand to be the obvious meaning and intent of the treaty and holds that by the expressed terms of that treaty there was reserved to the Indians the waters of Milk River as a part and parcel of the reservation set apart to them. We find no ground to question the correctness of our former decision.

The decree of the Circuit Court is affirmed.

(Endorsed:) Opinion. Filed Oct. 1, 1906. F. D. Monckton, Clerk.

71 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1336.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Montana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Montana, and was duly submitted.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed.

(Endorsed:) Decree. Filed and Entered October 1, 1906. F. D. Monckton, Clerk.

72 United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, HENRY CORREGAN; MATHESON DITCH COMPANY, a Corporation; COOK'S IRRIGATION COMPANY, a Corporation, and the EMPIRE CATTLE COMPANY, a Corporation, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Petition for Appeal.

The above mentioned appellants, Henry Winters, John W. Acker, Chris Cruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the first day of October, A. D. 1906, affirming the decree of the Circuit Court of the United States for the District of Montana, and that the matter in controversy in said suit exceeds One Thousand Dollars, besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has final jurisdiction, and that it is a

proper cause to be reviewed by the Supreme Court of the United States on appeal.

73 Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

E. C. DAY,
JAMES A. WALSH,
Attorneys for Appellants.

74 United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, HENRY CORREGAN; MATHESON DITCH COMPANY, a Corporation; COOK'S IRRIGATION COMPANY, a Corporation, and the EMPIRE CATTLE COMPANY, a Corporation, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Assignment of Errors.

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith their assignment of errors as to which matters and things they say, that the decree entered herein on the first day of October, 1906, is erroneous, to wit:

1. The said Circuit Court of Appeals erred in holding that by the treaty or agreement made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty or agreement.

2. The said Circuit Court of Appeals erred in holding that the reservation of the waters of Milk river, if any, contained in the treaty or agreement of May 1, 1888, entered into by the

75 United States, to the Indians residing upon the Fort Belknap Reservation, was binding upon the Appellants or any of them so as to effect the rights of the appellants to the use of the waters of the tributaries of said Milk river based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the State of Montana and decisions of its Courts, and the customs of the country.

3. The said Circuit Court of Appeals erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk river were superior to the rights of the appellants or either of them, for the reason that the answer alleges affirmatively that the appellants and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to and in compliance with the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the country to the extent claimed by them, and there is no sufficient allegation in the bill that there had ever been an appropriation of the said waters or any thereof according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court of Appeals erred in holding that the rights of the Indians living upon said Reservation to the use of the waters of Milk river were superior to the rights of the appellants, or either of them, for the reason that the answer alleges affirmatively that the appellants and each of them had diverted, appropriated and applied to a useful purpose the waters of said river or its tributaries, according to and in compliance with the laws of the United States, the laws of the State of Montana, and the decisions
76 of its courts, and the customs of the country, to the extent claimed by them, prior to any of the alleged acts of appropriation or diversion of the said waters by the said Indians, or by anyone on their behalf.

5. The said Circuit Court of Appeals erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these appellants or either of them to the prior right to the use of 5,000 inches of the waters of Milk river, or to the prior right to the use of the said waters at all, except to the extent of 250 inches as admitted in the answer.

Wherefore, the appellants pray that said decree may be reversed and that the appellants may have an adjudication and decree in their favor as herein specified.

E. C. DAY,
JAMES A. WALSH,
Attorneys for Appellants.

77 United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, HENRY CORREGAN; MATHESON DITCH COMPANY, a Corporation; COOK'S IRRIGATION COMPANY, a Corporation, and the EMPIRE CATTLE COMPANY, a Corporation, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby allowed as prayed.

WM. B. GILBERT,
United States Circuit Court Judge, Ninth Circuit.

Service of the foregoing accepted and copy received this 17 day of October, 1906.

CARL RASCH,
U. S. Att'y, Dist. of Montana.

(Endorsed:) Petition for Appeal, Assignment of Errors, and Order. Filed Oct. 17, 1906. F. D. Monckton, Clerk.

78 United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, HENRY CORREGAN; MATHESON DITCH COMPANY, a Corporation; COOK'S IRRIGATION COMPANY, a Corporation, and the EMPIRE CATTLE COMPANY, a Corporation, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Bond on Appeal.

Know all men by these presents, that we, Henry Winters, John W. Acker, Chris Cruse, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, as principals and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and authorized to become sureties on bonds, undertakings and obligations required in the Courts of the United States as surety, are held and firmly bound unto the United States

in the sum of $500.00, for which payment to be well and truly made we bind ourselves and each of our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of October, 1906.

79 Whereas, the above named principals as appellants have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Ninth Circuit on the first day of October, 1906;

Now therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

HENRY WINTERS,
JOHN W. ACKER,
CHRIS CRUSE,
AGNES DOWNS,
THOMAS DOWNS,
JOHN BUCKLEY,
BERTHA RESER,
LYDIA RESER,
EZRA T. RESER,
ANDREW H. RESER,
HENRY CORREGAN,
MATHESON DITCH COMPANY,
A Corporation,
COOK'S IRRIGATION COMPANY,
A Corporation, and the
EMPIRE CATTLE COMPANY,
A Corporation,

By E. C. DAY &
JAMES A. WALSH, *Their Attorneys.*

THE UNITED STATES FIDELITY & GUARANTY CO.,

[SEAL.] By WORDLEY B. SMITH,
Attorney-in-Fact.

The foregoing bond is approved this 17th day of October, A. D. 1906.

WM. B. GILBERT,
United States Circuit Court Judge, Ninth Circuit.

(Endorsed:) Bond on Appeal to Supreme Court U. S. Filed Oct. 17, 1906. F. D. Monckton, Clerk.

80 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1336.

HENRY WINTERS ET AL., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifteen (15) pages, numbered from one (1) to fifteen (15), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed therein, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record constitute a true copy of the entire record and the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled case.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 8th day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

81 United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, HENRY CORREGAN; MATHESON DITCH COMPANY, a Corporation; COOK'S IRRIGATION COMPANY, a Corporation, and the EMPIRE CATTLE COMPANY, a Corporation, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal, allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Henry Winters, John W. Acker, Chris Cruse, Agnes Downs, Thomas

Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, are appellants, and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. B. Gilbert — of the United States Circuit Court of Appeals, for the Ninth Circuit, this 17th
82 day of October, A. D. 1906.

WM. B. GILBERT,
Judge United States Circuit Court of Appeals, Ninth Circuit.

83 Due service of the foregoing citation admitted, and a copy thereof received, this 17th day of October, A. D. 1906.

CARL RASCH,
United States Attorney, District of Montana.

84 [Endorsed:] Docketed 1336. U. S. Circuit Court of Appeals, Ninth Circuit. Henry Winters, *et al. vs.* The United States. Citation on Appeal to Supreme Court U. S. Filed Oct. 17 1906 F. D. Monckton, Clerk.

Endorsed on cover: File No. 20,464. U. S. circuit court appeals, 9th circuit. Term No. 499. Henry Winters, John W. Acker, Chris Cruse, Agnes Downs, *et al.*, appellants, *vs.* The United States. Filed November 20th, 1906. File No. 20,464.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 499.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, ET AL., APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

To the Honorable the Supreme Court of the United States:

The appellants in the above-entitled cause respectfully petition this honorable court to advance said cause on its calendar and set the same for hearing at the present term at the earliest possible date, for the following reasons, to wit:

1. That the said cause is an appeal from the United States Circuit Court of Appeals for the Ninth Circuit, from a decree made and entered on the first day of October, 1906, in an action then pending in the said Circuit Court of Appeals, in which these appellants were appellants and the United States of America appellee; that the record was filed in this court on the 20th day of November, 1906, and has been printed; and that the said action is a proceeding on the part of the United States to restrain the appellants from using the waters of Milk river, a stream situated wholly within the State of Montana, as against the rights of the Indians residing upon the Fort Belknap Indian reservation, in said

State, under and by virtue of a treaty or agreement made and entered into by the United States with the said Indians on the first day of May, 1888.

2. That under and by virtue of the decree made, given, and entered in the above-entitled action, from which the said appeal is taken, the appellants, who are settlers upon the public lands of the United States, are perpetually enjoined and restrained from taking or diverting the waters of Milk river or its tributaries, or from in any manner or by any means impeding or obstructing the waters of said Milk river or its tributaries, so as to prevent the waters of said Milk river and its tributaries, to the amount of five thousand inches, from flowing down the channel of said Milk river to and upon the said Fort Belknap Indian reservation.

3. That said Milk river during the irrigating season, except for a short time during the spring freshets, does not flow past the intakes of the ditches of appellants to exceed five thousand inches, and the appellants by the said decree are deprived of the use of any of the waters of said stream during the period of year when the said waters are most needed for the irrigation of the lands of the said appellants.

4. That the lands owned and occupied by these appellants, as will appear from the record herein, are arid agricultural lands, and without irrigation crops cannot be successfully grown thereon, and while the said decree remains in force these appellants will be deprived of the use of the said five thousand inches of said waters and cannot in the ordinary course of the seasons successfully cultivate or produce crops on their said lands.

5. That the said appeal presents a controversy as to the rights of the settlers upon the public lands to the use of the

waters upon the public domain under and by virtue of the laws of the State of Montana, as against the claims of the United States for the use and benefit of the Indians residing upon the said reservation claiming rights under treaty agreements with the United States; that the questions involved are of great importance to the public, particularly to the persons residing within the State of Montana and other arid States similarly situated to appellants, and it is important that the questions may be determined by this honorable court at the earliest possible date, to the end that appellants and others settling upon the public lands in said arid States may be advised of their rights as against Indians residing upon reservations similarly situated to the Fort Belknap Indian reservation; that, as will appear from the record herein, the Government is proceeding with the construction of irrigation works for the use of the said Indians upon the said reservation, and it is particularly important that an early decision may be had, so that the parties hereto may know their rights and appellants be enabled to determine whether or not they shall continue to maintain their homes upon the said public lands as they have heretofore done.

All of which is respectfully submitted.

E. C. DAY,
Attorney for Appellants.

STATE OF MONTANA,
County of Lewis and Clark, ss:

E. C. Day, being first duly sworn, deposes and says that he is the attorney for the appellants in the foregoing petition and has entered the appearance of the said appellants in the above-entitled cause; that he has read the foregoing petition for advancement and knows the facts therein stated,

and that said facts are true, and that appellants believe that the public interests would be advanced by an early disposition of the said cause.

E. C. DAY.

Subscribed and sworn to before me this 9th day of January, A. D. 1907.

[SEAL.] STEPHEN CARPENTER,
Notary Public in and for said County and State.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 138.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, ET AL., APPELLANTS,

vs.

THE UNITED STATES

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for Appellants on Suggestions of Want of Jurisdiction.

I.

Appellants' briefs were filed on October 14. Respondent's brief was not filed until October 22, and, under rule 21, sub-div. 5, is not entitled to be heard.

It has been suggested by counsel for respondent that the proper parties are not before the court; that some of the defendants did not join in the appeal, and were not served with notice.

Some of the parties defendant who were served with process did not appear and a decree *pro confesso* was entered against them although no evidence was introduced. They were not necessary parties to the suit. They

are not necessary parties to the appeal. The suit is to enjoin the defendants from committing an alleged wrong —a trespass.

It is not alleged that the defendants acted jointly—no joint action or wrong is pleaded. It is not alleged that the defaulting defendants and the appellants acted jointly in the acts complained of. On the contrary, it is alleged that they constructed dams and reservoirs in the Milk River and its tributaries, and impeded the flow of water. The answering defendants, the appellants, admitted that they *severally* built, erected, and constructed across the channel of Milk River and its tributaries dams and reservoirs to divert the waters of those streams, but denied that it was unlawful and averred that it was done under the laws of the United States and the State of Montana (Rec., p. 15).

It is further averred that the individual defendants and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company, and the grantors and predecessors in interest of the Empire Cattle Company *each* for the purpose of irrigating their respective lands, posted their respective notices of appropriation, and thereafter commenced work on their respective ditches, and prosecuted work thereon until the same was completed and water diverted. That the twenty-eight stockholders of Cook's Irrigation Company and the fifteen stockholders of the Matheson Ditch Company, for the purpose of economically conveying the waters, organized two corporations and constructed ditches and distributed the water to the respective owners through lateral ditches (Rec., p. 17).

Judgment having been entered on the bill of complaint and answer, these allegations must be taken as true. They show a complete and separate right in each of these appellants—separate from any right that the defaulting defendants could assert. Their rights can not be affected

by any controversy between the appellants and the respondent.

The decree is, in fact, separate and severable. It is recited that "said defendants (naming them), and each of them, and them and each of their agents, attorneys, servants, etc., be enjoined."

It is not charged that the defendants acted jointly. Neither one is responsible for the acts of the other. In so far as the record shows, the defaulting defendants are not the owners of any lands and are not interested in this suit. They are not interested in any of the lands owned or waters used by the appellants. The appellants have set upseparate and distinct rights—separate and distinct from the defaulting defendants.

The judgment must be construed as a separate and several judgment.

In Hancock *vs.* Patrick, 119 U. S., 156, on motion to dismiss the appeal for failure to join all parties, the court said:

> "The judgment must be regarded as joint only in form, but several in fact and in law. It is to be read as if it were based upon a finding that the plaintiffs recover as against the defendant for the title asserted against him and against the intervenors as in respect to the title asserted by them against the plaintiff. . . . In fact, there were two suits, one interjected in the other, in which the parties are different, the titles are different, and there could be no joint judgment in both, except mere words. . . . It has always been held that when the decree is final and separate, or separable, those not affected by it are not necessary parties."

In an early case, Forgay *vs.* Conrad, 6 How., 201, the court said:

> "The bankrupt and the other defendants have not appealed. These three defendants claimed other property that had been conveyed to them

> at different times and by separate conveyances, as mentioned in the proceedings, and it is not, therefore, necessary that they should join in the appeal."

Under the appropriations we plead, and under the laws of Montana, of which this court will take judicial notice, each appropriation of water is a separate and distinct right.

In Gilfillan *vs.* McKee, 159 U. S., 303, the court said:

> "The decree was several both in form and substance and the interests represented by each defendant was separate and different from that of the other. In such case any party may appeal separately to protect his own interest.

In City Bank *vs.* Hunter, 129 U. S., 578, the court said:

> "The decree was several in fact and in law and the bank and Dawson were entitled to prosecute their appeal without joining their co-defendant who did not think proper to question the judgment."

In Milner *vs.* Meek, 95 U. S., 252, Mr. Chief Justice Waite, speaking for the court, said: "Milner alone appealed, but his appeal brings up so much of the case and such of the parties as are necessary for the determination of his rights."

In Todd *vs.* Daniel, 16 Pet., 521, Mr. Justice Story said: "The decree may be entirely right in regard to the other defendants, and yet it may be erroneous as to Todd. He has, or at least may have, distinct and separate rights in the controversy in respect to which he is entitled to be heard in this court."

In Railroad Co. *vs.* Johnson, 15 Wall., 8, a judgment of foreclosure was given against a railroad company and its trustee. The company alone appealed. Held appeal valid.

In Germain *vs.* Mason, 12 Wall, 261, it was held that all the defendants were not necessary parties to the appeal.

See, also—

Hill *vs.* Chicago and Evanston Ry. Co., 140 U. S., 52.

Basket *vs.* Haskell, 107 U. S., 602.

Louisville & N. A. C. *vs.* Pope, 74 Fed., 5.

Farmers' Loan & Trust Co. *vs.* McClure, 49 U. S., App. 146.

Mercantile Trust Co. *vs.* Adams Express Co., 16 U. S., App. 37.

In this case Mr. Justice Taft reviews the authorities.

The defaulting defendants have not asserted any claim to the use of the waters of Milk River or its tributaries. They have no interest in the claims of the appellants or either of them. They can not be affected by any decree made by this court. What purpose could be served by making them parties? They are already in default. They would have no standing in this court to present any question of law or fact. They have no pleadings, no assignment of errors, no record of any kind on which to ask the judgment of the court, or to assert any right in their own behalf, or oppose any right claimed by appellants or respondent.

Under the allegations in the bill the defendants are charged with being tort feasors—though not joint. The judgment must be severable. Even joint tort feasors can not claim contribution one from the other.

In this case the defendants were enjoined from doing certain acts. If the appellants show that they have a legal right to do those acts, the defendants, who have not asserted any right, can not be in any manner affected. They are not necessary parties to the appeal.

II.

Counsel for the Government also suggests that this case is one in which "is drawn in question" the "construction" and perhaps the "validity" of a "treaty," within the meaning of section 5 of the act of March 3, 1891. That section confers upon this court exclusive appellate jurisdiction, "in any case in which the constitutionality of any law of the United States or the validity or construction of any *treaty* made under its authority, is drawn in question." It is apparent from the language of this section, as well also as from the language of the entire Judiciary Act, that the term "treaty," as here used, is identical with the term as used in the Constitution, and refers only to agreements between the United States and foreign nations. And the cases in which the jurisdiction of this court under that clause of Section 5 has been invoked, have all been cases in which were involved the construction of agreements with foreign nations (Borgmeyer *vs.* Idler, 159 U.S., 414; Ornelas *vs.* Ruiz, 161 U. S., 502; Florida *vs.* Furman, 180 U. S., 402; Rice *vs.* Ames, 180 U. S., 371; Muse *vs.* Arlington Hotel Co., 168 U. S., 430). The rule is too well settled in this court to require citation of authority that an Indian tribe is not as regards the United States a foreign nation. And Congress by the act of March 3, 1871 (Rev. Stat., Sec. 2079), has expressly declared that Indian tribes are not foreign or independent nations with whom the United States will contract by *treaty*. Prior to that date Indian tribes had been treated as foreign nations, and treaties with them were made by the President with the consent of the Senate, as provided in article——, section——, of the Constitution (U. S. *vs.* Kagama, 118 U. S., 375; Cherokee Nation *vs.* Kansas Railway Co., 135 U. S., 641).

But assuming that the agreement with the Indians is a "treaty" within the meaning of the act of March 3,

1891, the construction of that agreement was not drawn in question by the case made out by the Government in the bill of complaint. The Indians are not parties to this suit. The United States alleges that it is the owner of the lands embraced within the Reservation and has appropriated waters, for use thereon, and has use for such water and that the defendants are diverting the same to its injury (see Trans., pp. 2 et seq.). The Government does not claim any right, title, or immunity by reason of said treaty, but bases its claim upon ownership. Its allegations with reference to the Reservation are merely incidental to the main case, and descriptive of the place where and the purpose for which the water is to be used.

This court has said in Borgmeyer *vs.* Idler, 159 U. S., 408, that the ground of jurisdiction, whether it be based on the constitutionalty of a law or the construction of a treaty must appear upon the face of the complaint, and to that point of time the inquiry must necessarily be directed.

Again, in Muse *vs.* Arlington Hotel Co., 168 U. S., 430, it was held:

> "As ruled in Ansboro *vs.* U. S., 159 U. S., 695, 697, 'a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision' (Cornell *vs.* Green, 163 U. S., 75, 78). The same rule is applicable in respect to the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted" (Bosgmeyer *vs.* Idler, 159 U. S., 408.)

In Sloan *vs.* United States, 193 U. S., 614, an action to compel an allotment under an Indian Treaty entered into prior to 1874, it was held that an appeal direct to to this court would not lie, for the reason that the construction of the treaty was only incidentally involved. In the case at bar the construction of the treaty did not arise until the decision of the court. The Government claimed the right to the water by virtue of its ownership of the lands and appropriation. The appellants claimed the waters under the laws of the United States and of the State of Montana. The lower courts sustained neither claim, but held that the treaty withdrew the waters from appropriation.

III.

Finally, counsel suggests that if the case comes within the terms of section 6, the decision of the Circuit Court of Appeals is final. In response to this it is sufficient to say that this is a suit in equity in which the United States is a petitioner to protect the property of the United States, jurisdiction of which is conferred upon the Circuit Court by sub-division 2 of Sec. 629, Rev. Stat., and the case is not within any of the classes mentioned in section 6, in which the decision of the Circuit Court of Appeals is declared to be final.

Respectfully submitted.

EDWARD C. DAY,
JAMES A. WALSH,
Solicitors for Appellants.

IN THE

Supreme Court of the United States.

October Term,

1906.

No. 499.

HENRY WINTERS, JOHN W. ACKER, CHRIS. CRUSE, AGNES DOWNS, ET AL,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This is an appeal from a final judgment made and entered in the United States Circuit Court of Appeals for the Ninth Circuit, enjoining the appellants from using or in any manner interfering with the use by the Government of the United States or the Indians upon the Fort Belknap Indian Reservation of five thousand inches of waters of Milk River, and its tributaries, situated in the State of Montana.

In the Bill of Complaint (tr. p 2) after the formal alle-

gation as to the parties, it is alleged among other things as follows:

"Fourth.

"That heretofore, to-wit, on or about the 1st day of May, A. D. 1888, a large tract of land situate within the northern part of the then Territory, now State of Montana, and then and there and thereafter, and at all times hereinafter mentioned, the property of your orator, the said United States, was reserved and set aparat by the said United States, as an Indian Reservation as and for the permanent home and abiding place of the Gros Ventre and Assinniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation; that the said Indian Reservation is now situated in the county of Chouteau, in the State and District of Montana, and its boundaries were at the said time of the creation of said reservation fixed and defined as follows, to-wit:

'Beginning at a point in the middle of the main channel of Milk river, opposite the mouth of Snake creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk river opposite the mouth of People's creek; thence up Milk river, in the middle of the main channel thereof, to the place of beginning.'

That ever since the said 1st day of May, A. D. 1888, the said afore mentioned and described tract of land has been, and the same is now an Indian Reservation, and the property of your orator subject to the occupancy of the said bands or tribes of Indians, and the same ever since the 1st day of May, A. D. 1888, has been and is now occupied and inhabited by the said bands or tribes of Indians as and for their permanent home and abiding place."

Fifth.

"That the said Fort Belknap Indian Reservation extends to the middle of the main channel of said Milk river, which said river is a non-navigable stream and water course, the said line in the middle of the main channel of said Milk river being the northern boundary line of said reservation. That large portions of the lands embraced within said reservation are well fitted and adapted for pasturage and the grazing and feeding thereon of stock and horses and cattle. That other large portions of said reservation are adapted for, and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of crops of grass, grain, and vegetables. That ever since the establishment of said Indian reservation large herds of cattle, the property of your orator and of the Indians residing upon said reservation, and large numbers of horses, the property of said Indians, have been and are now feeding, pasturing and grazing upon said reservation, and upon the lands within said reservation being and situate along and bordering upon said Milk river."

Sixth.

"That such portions of the said Fort Belknap Indian reservation as are adapted and fitted for farming and cultivation and the pursuits of agriculture thereon, as aforesaid, are of a dry and arid character, and in order to make the same productive, and for the purpose of successfully raising thereon crops of grain, grass, and vegetables, require large quantities of water for the purpose of irrigating the same. That without water for the irrigation of said lands, the same would be and remain unproductive, and it would be impossible to successfully raise upon said lands crops of grain, grass and vegetables. That heretofore in the year 1889, your orator erected and constructed houses and buildings upon said reservation for the occupancy and residence of the United States Indian Agent and the officers of your

orator having the charge and superintendency of said reservation and the Indians residing thereon, generally known as the Fort Belknap Agency, and ever since the said year 1889 the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of your orator having charge and superintendency of said reservation. That the said agency depends entirely for its water supply for domestic, culinary and irrigation purposes upon the waters of the said Milk river, and that at all times, ever since the erection of said houses and buildings and the establishment of said agency, your orator has been obliged and is now obliged to depend for its water supply for said agency and for the purposes aforesaid upon the waters of said Milk river. That heretofore, and long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to-wit, in the year 1889, your orator through its officers and agents at said Fort Belknap Agency, for the purpose of obtaining the requisite amount of water for domestic, culinary and irrigating purposes for said agency appropriated, took and diverted from the channel of said Milk river, by means of pumps, pipes, and waterways, a large amount, to-wit, a flow of one thousand miner's inches of the water of said Milk river, and by means of pumping the same out of the channel of said Milk river, and by ditches, pipes, and waterways conducted the said waters of said river, so taken and diverted from said river as aforesaid, from the channel of said river to the said agency buildings and premises, and after so conducting the said waters to said agency buildings and premises, used the same for domestic, household and culinary purposes, and also for the irrigation of lands adjacent to, connected with, and surrounding said agency buildings and premises, and by means of the use of said waters for irrigation purposes, raised upon said premises adjacent to and connected with said agency crops of grain, grass and vegetables. That

thereafter, but long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to-wit, on the 5th day of July, A. D. 1898, your orator and the Indians residing upon said reservation, for the purpose of bringing and conducting water to and upon the lands of said Fort Belknap Indian Reservation with which to irrigate the same and raise thereon crops of grain, grass, and vegetables, appropriated, took and diverted from the channel of said Milk river, by means of canals, ditches and waterways, additional large amounts of the waters of said Milk river, to-wit, a flow of ten thousand miner's inches of the waters of said river, and by means of canals, ditches and waterways conducted the water of said river, so taken and diverted from the said river as aforesaid, from the channel of said river to and upon divers and extensive tracts of land upon said reservation aggregating in amount about thirty thousand acres of land, and after so conducting said waters to and upon said lands used the same for irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands, crops of grain, grass and vegetables."

"That ever since the said year 1889, and down to the time of the commission of the wrongs and grievances committed by the said defendants as hereinafter set out and complained of, your orator and its officers and agents residing at said agency, have constantly, and uninterruptedly used and enjoyed the said waters of said Milk river so taken and diverted as aforesaid in the year 1889, at and upon said agency for domestic, culinary and household purposes, and for the irrigation of the lands and premises adjacent to and connected with said agency, and for raising upon said premises crops of grain, grass and vegetables, and ever since the said year 1898, and down to the time of the commission of the wrongs and grievances of the said defendants hereinafter set out and complained of, your orator and its officers and agents and

the said Indians residing upon the said reservation as aforesaid, have continuously and uninterruptedly used and enjoyed the said waters of said Milk river so appropriated, taken and diverted as aforesaid, on the 5th day of July, 1898, upon said lands embraced within said reservation for irrgiating, domestic and other useful purposes, and by means of said waters so taken and diverted from said Milk river, and used by your orator and the said Indians residing thereon as aforesaid, have raised upon said lands crops of grain, grass and vegetables and carried on agricultural pursuits, and your orator has been enabled by means thereof to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement."

Seventh.

"And your orator further showeth unto your Honors that large tracts of land within said Fort Belknap Indian Reservation, being and situate along and contiguous to the channel of said Milk river, are used by your orator from year to year for the pasturing, feeding, raising, and grazing of livestock, principally horses and cattle, the property of your orator and said Indians residing upon said reservation. That in order to enable your orator and said Indians to successfully and properly pasture, and feed said horses and cattle upon said lands, it is necessary and essential that the waters of said Milk river, should be permitted to flow down the channel of said river, to supply and furnish said stock with drinking water. That unless the waters of said river are permitted to flow down the channel of said river, the said cattle and horses, so pasturing and feeding upon said lands, will be deprived of water necessary for drinking purposes, and will render valueless for grazing, feeding and ranging purposes large tracts of lands within said reservation, situate along and contiguous to the channel of said Milk river."

Eighth.

"And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated and diverted from the channel of said Milk river as aforesaid, are essential and necessary for the use of your orator at the agency on said Fort Belknap Indian Reservation for household, domestic and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said band and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive for the raising thereon of crops of grain, grass and vegetables, large quantities of water flowing in said Milk river will be required and necessary for the purpose of irrigation of the said lands within said reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians, and to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stockraising as aforesaid, it is essential and necessary that all of the waters of said Milk river should be permitted to flow down the channel of said river, un-

interruptedly and undiminished in quantity, and undeteriorated in quality."

Ninth.

"And your orator further showeth unto your Honors, that notwithstanding riparian and other rights of your orator and of the said Indians to the uninterrupted flow of all the waters of said Milk river, as aforesaid, down the natural channel of said river, the said defendants, heretofore, to-wit, in the year 1900, wrongfully and unlawfully, and without the license, consent or approval and against the wishes of your orator, and of the said Indians and without the license, consent or approval and against the wishes of the Secretary of the Interior of the said United States, and in utter disregard of the rights of your orator and the Indians residing upon the said Fort Belknap Reservation, entered upon the said Milk river and its tributaries above the points of diversion of the said waters of said river by your orator and said Indians, as aforesaid, and above the places of use of said waters by your orator and said Indians, built, erected, and constructed in and across the channel of said Milk river and its tributaries, large and substantial dams and reservoirs and by means of said dams and reservoirs impeded, obstructed and prevented the waters of said Milk river and its tributaries from flowing down the natural channel of said river to the places of your orator's points of diversion and use of the said waters of the said river. That by means of said dams and reservoirs and by means of canals, ditches and waterways, made and constructed wrongfully and unlawfully and without the license, consent, or approval of the Secretary of the Interior, over and through the public lands of your orator, by the said defendants, said defendants appropriated, took, and diverted all of the waters of the said Milk river and its tributaries out of and away from the channel of said river and its tributaries, and by means of said canals, ditches, and waterways, conducted and conveyed the same long

distances away from the channel of said Milk river and its tributaries, and away from the said Fort Belknap Indian Reservation. That by means of said dams and reservoirs and said canals, ditches and waterways said defendants prevent any of the waters of said Milk river and its tributaries from flowing down the channel of said river to your orator's points of diversion and places of use of said waters, and wholly deprived your orator and the Indians residing upon said reservation of the use of the waters of said river, all of which said acting and doings as aforesaid, of the said defendants was without the license, consent or approval of your orator, the said United States, and without the license, consent or approval of the Secretary of the Interior of the said United States."

Upon filing the Bill of Complaint an order was issued and served upon the appellants requiring them to show cause why a temporary restraining order should not be issued enjoining them from using the waters of said Milk river and its tributaries during the pendency of the suit. In response to the order to show cause the appellants filed affidavits setting forth substantially the same facts as are set forth in the answer hereinafter mentioned, and some testimony was introduced on the part of the United States tending to show that five thousand inches of water were used by the Indians upon the reservation. Thereupon an interlocutory order was made enjoining appellants and each of them from interfereing in any manner with the use of five thousand inches of the waters of said Milk river and its tributaries by the Government of the United States or the Indians upon the Fort Belknap Indian Reservation. An appeal from that order was taken to the Circuit Court of Appeals for the Ninth Circuit, and the order was by the Court affirmed.

Winters vs. United States, 143 Fed. 740, 74 C. C. A. 666.

Thereupon the appellant filed in the Circuit Court their joint answer (tr. pp. 11-9), which so far as is material to the present controversy, is as follows, to-wit (tr. p. 13):

"II.

"And as a further answer to said bill of complaint, and by way of further defense thereto, these defendants show unto your Honors that the claim of the plaintiff and the Indians upon said Fort Belknap Reservation to the waters of said Milk river, as against the claims of these defendants herein is inequitable, unjust and without right in this:

"First: That prior to the first day of May, 1888, all that part of the State of Montana, lying north of the line bounded by the Missouri river, up to the Marias river; thence up the Marias river to Birch creek; thence up Birch Creek to its source; thence west to the crest of the Rocky Mountains, including the Milk river and the lands occupied by these defendants, and also the lands embraced in the Fort Belknap Indian Reservation, described in the bill of complaint, was by the Act of Congress approved April 15th, 1874, set apart and reserved for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfeet and River Crow and other Indians that the President might wish to place upon said reservation; but that such right was the bare right of the use and occupancy thereof at the will and sufferance of the Government of the United States. That the Government of the United States, for the purpose, and with the intent of opening for settlement a large portion of the lands embraced within the said reservation hereinbefore described and particularly set forth and described in the Act of Congress, approved April 15, 1874, made and entered into an agreement with the Indians composing the tribe of Gros Ventres, Piegan, Blood, Blackfeet and River Crow

Indians, wherein and whereby the said Indians, for a valuable consideration, relinquished, ceded, sold, transferred and conveyed to the Government of the United States all of their right, title, claim and interest in and to all of said lands included in said reservation theretofore used and occupied by them, excepting the lands included in the Fort Belknap Indian Reservation, described in the Bill of Complaint, and those included in the Fort Peck and the Blackfeet Reservations, and the said Indians thereafter did not have any right, title, claim or interest in or to the lands thus relinquished, ceded and conveyed to the Government of the United States, or to the waters flowing thereon. That the said agreement with the said Indians was thereafter, by the Act of Congress approved May 1st, 1888, ratified, affirmed and approved, and it was by the said Act declared and provided that the lands to which the Indians' title was thus extinguished were a part of the public domain of the United States, open and subject to entry and settlement under the provisions of the laws regulating homestead entries, excepting Section 2301 of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands and mineral lands; and the lands thus ceded and relinquished by the Indians, and so declared by the Act of Congress to be a part of the public domain of the United States, then became and were a part of the public domain of the United States, and it was the purpose and intent of the Government that the said lands should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed and cultivated, and communities of civilized persons be established thereon."

"Second. And these defendants further show unto your Honors that these defendants, who are individuals, are each and every of them, and their grantors and predecessors in interest were citizens of the United States, over the age of twenty-one years, and qualified to enter upon

and acquire title to the public lands of the United States open to entry under the Homestead and Desert land laws. That the defendants, Matheson Ditch Company and Cook's Irrigation Company are and were, at all times in said Bill of Complaint, and hereinafter mentioned, corporations, organized and existing under the laws of the State of Montana, for the purpose of supplying to their stockholders the waters of the said Milk river and its tributaries, to be used by their said stockholders in the irrigation of the lands so owned and possessed by the said stockholders. That during all the times in said bill of complaint mentioned, the said stockholders of each of said corporations and all of them were citizens of the United States, over the age of twenty-one years, and qualified to become settlers upon the public lands of the United States and to acquire title thereto, under the homestead and desert land laws of the United States."

That the defendant Empire Cattle Company is, and at all times hereinafter mentioned was a corporation, organized and existing under the laws of the State of Montana, and authorized by such laws to acquire title by purchase to lands, tenements and hereditaments, together with all appurtenances usually connected therewith, and that said Empire Cattle Company is by purchase the owner and holder of certain lands bordering upon the said Milk river and its tributaries, purchased from persons who had acquired title thereto under the homestead and desert land laws of the United States, and that each of the grantors of the said Empire Cattle Company were, at the time of the acquisition of such title, citizens of the United States, over the age of twenty-one years and qualified to acquire title to the said lands under the Desert and Homestead land laws of the United States."

"Third. And these defendants further show unto your Honors that at sundry times after the lands were thus ceded and relinquished by the Indians and declared open for settlement as aforesaid, and prior to the fifth day of

July, 1898, and before any appropriation, diversion or use of the waters of Milk river or its tributaries was made by the plaintiff or the said Indians on said Fort Belknap Indian Reservation, excepting a pumping plant of the capacity of about two hundred and fifty miner's inches, the individual defendants herein and the stockholders of the Matheson Ditch Company, and the Cook's Irrigation Company, and their grantors and predecessors in interest and the grantors of the Empire Cattle Company, without having any notice or knowledge that there was any claim made by the plaintiff herein, or the Indians on said Fort Belknap Indian Reservation that there was any reservation made on the waters of said Milk river or its tributaries for use on said reservation, and believing that all waters on the said lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the laws, decisions, rules and customs of the State of Montana in like manner as waters on other portions of the public domain, entered upon the said public lands of the United States in the vicinity of Milk river, being a part of the public lands of the United States to which the Indians aforesaid had relinquished, ceded and conveyed to the Government of the United States all their right, title and interest, and which were thrown open to settlement by the Government pursuant to the act of Congress, approved May 1, 1888, as aforesaid, and each respectively, made entry at the United States Land Office for certain portions of the said public lands and thereafter settled upon, improved, reclaimed and cultivated the same, and performed all things required to be performed by the laws of the United States relative to the acquisition of title to lands under the homestead and desert land laws of the United States, and in all things complied with the provisions of said laws, and thereafter made due proof before the United States Land Office of the performance of all things to be by them performed under the said law, and a com-

pliance with all the rules and regulations prescribed by the Secretary of the Interior, and thereupon the Government of the United States issued to them each respectively, a patent wherein and whereby the said Government conveyed to them respectively in fee simple the lands thus entered, settled upon, cultivated and reclaimed as aforesaid."

"That all of the said lands are situated within the watershed of the said Milk river, and are riparian lands, situated upon the said Milk river and its tributaries, and all said lands are arid agricultural lands, and for the purpose of reclaiming the said lands and making the same inhabitable and capable of growing crops thereon, it is necessary that said lands be irrigated by artificial means, and without such irrigation the said lands cannot be reclaimed, would not be inhabitable, and crops could not be successfully cultivated and grown thereon."

"Fourth. And these defendants further show unto your Honors, that, for the purpose of reclaiming said lands, and making the same inhabitable, and for the purpose of cultivating and growing crops thereon, the individual defendants herein, or their predecessors in interest, and the stockholders of the Matheson Ditch Company and the Cook's Irrigation Company, and the grantors and predecessors in interest of the defendant, Empire Cattle Company, each for the purpose of, and intending to divert and appropriate waters of said Milk river and its tributaries, for the purpose of irrigating their respective lands aforesaid, acting under the laws of the United States and the laws of the State of Montana, the decisions of its Courts and the rules and customs of the country, posted upon said Milk river and its tributaries at the respective points of intended diversion, notices respectively setting forth the number of inches claimed, the purpose for which it was claimed, the place of intended use, the means of diversion, with the size of the flume, ditch or pipe by which he intended to divert it, the date of the ap-

propriation, the names of the appropriators, and within twenty days thereafter filed in the office of the clerk and recorder of the county wherein the said lands are situated, a copy of the said notices, duly verified, and within forty days thereafter commenced the construction of their respective ditches, with the necessary dams and reservoirs, and prosecuted the work thereon with diligence until the same was completed, and thereby diverted, appropriated, conveyed and applied to a beneficial use large quantities of the waters of said Milk river and its tributaries, to-wit, more than five thousand miner's inches or one hundred and twenty cubic feet per second, all of which said waters were so diverted and appropriated prior to the first day of July, 1898, and, at all times since, up to the time of issuing of the injunction herein, were used by these defendants and the stockholders of the said Matheson Ditch Company and Cook's Irrigation Company in irrigating their said lands and producing hay, grain and other crops thereon, and for household and other domestic purposes."

That the lands owned and occupied by the stockholders of the defendant, Cook's Irrigation Company, which stockholders are about twenty-eight in number, and the lands owned and occupied by the stockholders of the Matheson Ditch Company, which stockholders are about fifteen in number, are so situated that the waters can be more economically conveyed through a separate ditch for each corporation, and then distributed to the several tracts owned by the respective stockholders, by laterals connected therewith, and for the purpose of using said waters economically, and for the purpose of constructing a ditch to convey waters to the said lands, the said stockholders of the Cook's Irrigation Company organized a corporation of the defendant Cook's Irrigation Company, for the purpose of constructing and maintaining an irrigation ditch to reclaim and irrigate the lands of the said stockholders, so occupied by them; and the stock-

holders of the Matheson Ditch Company organized the corporation of the Matheson Ditch Company for the purpose of constructing and maintaining an irrigating ditch to convey waters to, and reclaim and irrigate the lands of the said stockholders, so occupied by them, and the rights of the said respective stockholders are determined by the amount of water appropriated by them, and the amount of stock owned by them in the respective corporation, and ever since the Cook's Irrigation Company and the Matheson Ditch Company have been, and up to the time of issuing of the temporary injunction herein, were engaged in the business of carrying and conducting the said waters aforesaid, to the lands owned and occupied by their respective stockholders, which said waters so conveyed were used by the stockholders of said corporations in irrigating their lands, and producing hay, grain and other crops thereon and for household and other domestic purposes."

"Fifth. And these defendants further show unto your Honors that the defendants herein, and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company have expended many thousands of dollars in constructing said dams, ditches and reservoirs and other work in and about reclaiming said lands, and have expended thousands of dollars in improving said lands, and in building homes, fences, and other structures and establishing schools, and constructing highways, and other improvements usually had and enjoyed in a civilized community, and that the only source of supply for waters to irrigate said lands is from the said Milk river and its tributaries, and if these defendants are deprived of the use of said waters, their said lands cannot be successfully cultivated, and crops cannot be successfully grown thereon and they will become useless, and homes cannot be maintained thereon. That in addition to the lands occupied by the defendants herein and the stockholders of the Cook's Irrigation Company, and of the Matheson Ditch Company, there are large tracts of land of like

character, situated within the watershed of said Milk river and its tributaries, wholly dependent upon the waters of said Milker river and its tributaries for irrigation, and without said waters the said lands cannot be reclaimed, and cannot be successfully cultivated, and homes maintained thereon. That a large number of persons have settled upon said lands, under the land laws of the United States, acquired title thereto, and have reclaimed the same by means of the waters of said Milk river, and its tributaries, and now irrigate and cultivate the same by means of said waters, and that said persons have assisted these defendants in establishng a civilized community in said country, and in building and maintaining churches, schools, villages and other elements and accompaniments of civilization; and said communities consist of thousands of people who are dependent for support upon the successful reclamation and cultivation of said lands, thus thrown open to settlement, and the business and industries arising therefrom, and if the claim of the complainant herein and the Indians to the said waters of said Milk river is maintained, the lands of these defendants and the other settlers herein mentioned will be renederd valueless, the said communities will be broken up or destroyed, and the purpose and object of the Government in opening said lands for settlement will be wholly defeated."

"Sixth. And these defendants further show unto your Honors, that there are situated upon the said Fort Belknap Indian Reservation a large number of springs, and several streams, from which waters can be obtained for stock and irrigation and particularly these:

People's Creek, flowing about 1,000 inches of water.

Big Warm Creek, flowing about 1,000 inches of water.

Lodge Pole Creek, flowing about 600 inches of water, and Clear Creek, flowing about 300 inches of water, all of which can be made available for use upon said Reservation and that it was not the purpose or intention of

the Government to reserve, for the use of the said Indians, and it did not reserve any of the waters of said Milk river or its tributaries outside of the boundaries of said Reservation, and that all of the said waters were open to appropriation, under the laws, decisions and customs aforesaid."

"Seventh. And these defendants further shows unto your Honors that the respective claims of these defendants to the waters of said Milk river and its tributaries are prior and paramount to the claims of the plaintiff or the Indians residing upon said Fort Belknap Reservation, excepting the amount of 250 inches of water used in and around the said agency buildings, and that at all times there has been a sufficient quantity of water flowing down the channel of said Milk river, to the plaintiff's point of diversion, to more than supply the said 250 inches."

"Eighth. And defendants further show unto your Honors that the use of the waters of said Milk river and its tributaries are necessary and indispensable to these defendants and the stockholders of the Cook's Irrigation Company and the Matheson Ditch Company in irrigating and cultivating their lands and maintaining their homes thereon, and are of great value to them, to-wit, a value of more than $100,000; and if the claim of the plaintiff and the Indians thereto is sustained and these defendants and the said stockholders are deprived thereof, their lands will be ruined, it will be necessarry to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but it will greatly exceed $100,000.00, and these defendants will be wholly without remedy."

Upon motion of complainant the court entered a decree upon the bill and answer perpetually enjoining the defendants and appellants and each of them from using or interfering in any manner with the use of five thousand

inches of the waters of Milk river or its tributaries by the Government of the United States and the Indians upon said Fort Belknap Indian Reservation. (Tr. pp. 20, 21, 22.)

From this final decree an appeal was taken taken to the Circuit Court of Appeals in and for the Ninth Circuit, where, on the first day of October, 1906, the decree appealed from was, by the Circuit Court of Appeals affirmed

Winters vs. United States, 148 Fed. 684; 78 C. C. A., 546;

(Tr. p. 31) from which judgment the present appeal is taken.

ASSIGNMENT OF ERRORS.

The appellants assign as error upon this appeal the following: (Tr. p. 34.)

1. The said Circuit Court of Appeals erred in holding that by the treaty or agreement made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk river to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty or agreement.

2. The said Circuit Court of Appeals erred in holding that the reservation of the waters of Milk river, if any, contained in the treaty or agreement of May 1, 1888, entered into by the United States, to the Indians residing upon the Fort Belknap Indian Reservation, was binding upon the appellants or any of them so as to effect the rights of the appellants to the use of the waters of the tributaries of said Milk river based upon acts of appropriation done and had in pursuance to the laws of the United

States, the laws of the State of Montana and decisions of its Courts, and the customs of the country.

3. The said Circuit Court of Appeals erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk river were superior to the rights of the appellants or either of them, for the reason that the answer alleges affirmatively that the appellants and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to and in compliance with the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the country to the extent claimed by them, and there is no sufficient allegation in the bill that there had ever been an appropriation of the said waters or any thereof according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court of Appeals erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk river were superior to the rights of the appellants or either of them, for the reason that the answer alleges affirmatively that the appellants and each of them had diverted, appropriated and applied to a useful purpose the waters of said river or its tributaries, according to and in compliance with the laws of the United States, the laws of the State of Montana, and the decisions of its courts, and the customs of the country, to the extent claimed by them, prior to any of the alleged acts of appropriation or diversion of the said waters by the said Indians, or by anyone on their behalf.

5. The said Circuit Court of Appeals erred in holding

that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these appellants or either of them to the prior right to the use of 5,000 inches of the waters of Milk river, or to the prior right to the use of the said waters at all, except to the extent of 250 inches as admitted in the answer."

ARGUMENT.

The questions presented by these several assignments of error may be briefly stated thus:

1. Whether there was any reservation in the agreement with the Indians of the waters of Milk river and its tributaries for the use of the Government or the Indians on the Fort Belknap Indian Reservation.

2. Whether the waters in the lakes, rivers and streams upon the lands which were ceded by the Indians and declared to be a part of the public domain, and open for settlement under the land laws of the United States by the Act of Congress, approved May 1, 1888, were subject to appropriation under the laws of the United States and the laws of the State of Montana.

3. Whether the United States or the Indians upon the Fort Belknap Reservation have any rights, and if any, what rights, as riparian owners, to the waters of Milk river as against the appropriators under the United States and the State laws.

4. Whether the rights of an appropriator of water under the laws of the United States and the State of Montana are superior to those of a person, corporation or Government not appropriating in compliance with those laws.

CONSTRUCTION OF THE AGREEMENT WITH THE INDIANS.

In the various opinions of the Circuit Court of Appeals the agreement with the Indians is called a treaty. The Act of March 3, 1871, Section 2079, Revised Statutes, provides that "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty." Since the adoption of that Act all dealings between the Indians and the Government have been by agreement and not by treaty.

The judgment appealed from, like the preceding interlocutory orders in the case, is based upon the conclusion of the court that "it was the intention of the treaty to reserve sufficient waters of Milk river, as was said by the court below, 'to insure to the Indians the means wherewith to irrigate their farms', and that it was so understood by the respective parties to the treaty at the time it was signed."

Winters v. United States, 74 C. C. A. 672.

The material parts of the agreement are as follows: "Whereas the reservation set apart by Act of Congress approved April fifteenth, eigtheen hundred and seventy-four for the use and occupancy of the Gros Ventres, Piegan, Blood, Blackfeet, River Crow, and such other Indians as the President might, from time to time, see fit to locate thereon, is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their present or prospective wants; and whereas the said Indians are desirous of disposing of so much thereof as they do not require, in order to obtain the

means to enable them to become self-supporting, as a pastoral and agricultural people, and to educate their children in the arts of civilization. Therefore, to carry out such purpose, it is hereby agreed, as follows:

"Article I.

"Hereafter, the permanent home of the various tribes or bands of said Indians shall be upon the separate reservation hereinafter described and set apart. Said Indians acknowledging the rights of the various tribes or bands, at each of the existing agencies within their present reservation, to determine for themselves, with the United States, the boundaries of their separate reservation, hereby agree to accept and abide by such agreements and conditions as to the location and boundaries of such separate reservation, as may be made and agreed upon by the United States and the tribes or bands for which such separate reservation may be made, and as the said separate boundaries may be hereinafter set forth."

"Article II.

"The said Indians hereby cede and relinquish to the United States all their right, title and interest in and to all the lands embraced within the aforesaid Gros Ventres, Piegan, Blood, Blackfeet, and River Crow Reservations, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation."

"Article III.

"In consideration of the foregoing cession and relinquishment, the United States hereby agrees to advance and expend annually, for the period of ten years after the ratification of this agreement, under direction of the Secretary of the Interior, for the Indians now attached to and receiving rations at the Fort Peck Agency, one hundred and sixty-five thousand dollars; for the Indians now attached to and receiving rations at the Fort Belknap Agency, one hundred and fifteen thousand dollars, and for the Indians now attached to and receiving rations at the Blackfeet Agency, one hundred and fifty thousand dollars, in the purchase of cows, bulls, and other stock, goods, clothing, subsistence, agricultural and mechanical implements, in providing employees, in the education of Indian children, procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans of said Indians, in the erection of such new agency and school buildings, mills, and blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build houses and inclose their farms, and in any other respect to promote their civilization, comfort and improvement." * * *

"Article V.

"In order to encourage habits of industry, and reward labor, it is further understood and agreed, that in giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided for in Article III, preference shall be given to the Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits, as a

means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, as shall best promote the objects specified."

25 U. S. Statutes at Large, p. 113.

By the Act ratifying the agreement it is provided:

"Sec. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States, and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the Townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain."

25 U. S. Statutes at Large, p. 133.

It will be noticed that the only language in the agreement expressing a direct reservation in favor of the Indians is at the close of Article II, where after *ceding and relinquishing all their right, title and interest* in and to all the lands formerly embraced in the Reservations, but not now set apart, the Indians reserve "to themselves *only* the reservation herein set apart for their separate use and occupation."

We do not believe that it will be here contended that the agreement contains an *express* reservation of the waters of Milk river. But the decision proceeds upon the theory that under all of the circumstances it must be inferred that the Government and the Indians intended to reserve the waters for the use of the Indians for purposes of irrigation. But what were the circumstances.

At the time the agreement was made, a few thousand Indians were occupying a territory, comprising all the Northeastern portion of the territory of Montana, containing approximately 35,000 square miles. The territory occupied was wholly out of proportion to the number of Indians, and greatly in excess of their wants present or prospective. (See Preamble to the agreement.) These Indians lived principally by hunting, and knew practically nothing about agriculture. They desired to relinquish the lands that they did not need to procure the things enumerated in Article IV of the agreement. The Great Northern Railroad had, the year before been completed through the Reservation a distance of about 300 miles. The great tide of immigration was moving westward, and the Government desired to open these lands for settlement, to restrict the size of the Indian Reservation, and to establish civilized communities upon the relinquished land.

All these lands are arid, and without artificial irrigation, will not produce crops, and are practically valueless. They are of no use, except for grazing roving herds of stock. When irrigated, they produce bountiful crops. More than half of the area of the Reservation, as it then existed, was drained by Milk river and its tributaries. There is no source from which water can be procured to reclaim and irrigate these lands, other than the said Milk river and its tributaries. Without these waters, the lands would be practically of no value, civilized communities could not be established, or exist thereon. The Indians were fully acquainted with all these conditions. The agreement was made between the Chiefs, head men, and principal men of the different tribes residing on the Res-

ervation, and the Committee appointed by Congress for that purpose. The agreement was duly executed by the Indians. No reservation of water for either of the reservations was made. The Indians ceded and relinquished all rights to the other lands, reserving only the respective reservations set apart to them. Before the signatures of the respective tribes of Indians were affixed it was declared as follows:

"The foregoing articles of agreement having been fully explained to us, in open Council, the undersigned, chiefs, head men and principal men of (naming the respective tribes) do hereby consent and agree to all the stipulations therein contained."

25 U. S. Statutes at Large, p. 124.

And following each list of signatures is a certificate of the United States Interpreter and a special interpreter representing the Indians, as follows:

"We hereby certify that the foregoing articles of agreement were carefully read and explained to the Indians above named, in open council, and were thoroughly understood by them before signing the same. * * *

25 U. S. Statute at Large, p. 128.

Considering the language used, and the conditions and circumstances under which the agreement was executed, it cannot be held that the Indians understood that there was any reservation of the waters of Milk river for use upon the Belknap Reservation, or that they ceded and relinquished to the Government anything less than the absolute title to the lands and all waters thereon to that portion of the former Reservation to which they relinquished their claims. In fact, those Indians, at the time the agreement was made, had little, if any knowledge about irrigation,

or the results produced by irrigating those lands. It was claimed in the lower Court that the greatest souvenir left by the aboriginal races of North America is to be found in the maze of prehistoric canals, found in the Salt River and the Gila Valleys in Arizona. These were constructed in prehistoric times. The history of their construction, and of the people who constructed them, is lost in obscurity. There is no evidence, historic or other, that these Indians or their ancestors practiced irrigation in this country, or that they had any knowledge of irrigation. It therefore cannot be said that the Indians intended to reserve the waters of Milk river for the purpose of irrigation, or any other purpose. But if we concede that the Indians did understand the subject of irrigation, and that they, and the persons acting for the Government, understood the meaning, object and purpose of the agreement, and that the soil could not be cultivated without the use of the water to irrigate the same, it does no prove or tend to prove that there was any reservation of the waters of Milk river intended for use on the Reservation. Assuming that both parties fully understood the needs of irrigation, and that this land, excepting for the grazing of roving herds of stock thereon, is practically valueless, it cannot be said that any reservation of the waters of Milk river was intended. The Government desired to open that land for settlement, and to establish civilized communities thereon. The officers of the Government knew that this land could not be reclaimed without water. They knew that there was no water to reclaim it, excepting that flowing in Milk river and its tributaries. The Indians also knew this. Under the agreement the Indians ceded and relinquished to the Government all their right,

title, claim and interest in and to the lands formerly included in their reservation, excepting only those parts included in the Fort Peck, Fort Belknap and Blackfeet Reservations, and reserved to themselves only the reservations thus retained. The Government, under the terms of the agreement, and in consideration of the Indians ceding all their right to the lands, not included in those reservations, agreed to expend, and did expend, within ten years succeeding the date of the agreement, as provided in Article III of the agreement, for the use and benefit of the Indians, the princely sum of $4,300,000.00. In addition to that it has each year since the expiration of the ten year period, expended thousands of dollars for the use and benefit of the Indians. If there is an implied reservation of the waters of Milk river, for use on the Fort Belknap Reservation, the very purpose and object of the agreement with the Indians is defeated. The Government gets no consideration for the $4,300,000.00, expended for the use of the Indians. The lands relinquished are valueless without the water, and cannot be reclaimed. If it were the only purpose of the Government to civilize the Indians, and make them a self-supporting, pastoral people, it could have accomplished that object better by expending that amount of money and leaving the Indians the entire reservation, thus affording them an opportunity to select the best agricultural lands which could be cultivated, at the least expense, and also leaving them large areas for pasturage. The civilization of the Indians is promoted by having them surrounded with white settlers, following agricultural pursuits. From these, the Indians can learn the ways of civilized people. It would not aid the civilization of the Indians to place them upon

a restricted reservation, and replace them on the rest of the reservation by a few Nomadic white herdsmen.

It will be noticed that, by Article II of the agreement, the Indians expresly ceded and relinquished to the Government all their right, title and interest in and to all lands embraced within the limits of their former reservation and not included in the limits of the reservation therein described, "reserving to themselves *only* the reservation herein set apart for their separate use and occupation." Also, that the Act of Congress, ratifying the agreement, expressly provides that the lands, to which the right of the Indians is thus extinguished under that agreement, are a part of the public domain of the United States, and are open to settlement under the laws relating to homestead entries except Section 2301 of the Revised Statutes and the laws governing the disposition of coal mines, desert lands and mineral lands. These provisions are in conflict with and prohibit any implied reservation of the use of the waters. When the Indians ceded all of the lands to which they had formerly claimed title, except those contained in the reservation, they relinquished all claim to the waters flowing in the streams through them, unless they expressly reserved such waters. When Congress declared the lands, to which the Indian title had been extinguished, to be a part of the public domain, *the water of all the lakes, rivers and other sources, unless expressly reserved,* became subject to appropriation under the terms of Act of Congress March 3, 1877, as amended in 1891. All of the appropriations of water set forth in the answer of the appellants were made upon streams *outside of the limits of the Indian Reservation.*, and were

made upon streams which were included as a part of the public domain thus thrown open to settlement, and were made to be used upon lands thus thrown open to settlement, the title to which could not be acquired from the United States, under the desert land laws, except upon condition of appropriation of these waters.

It may be contended that the fact that the middle of the channel of Milk river was made the northern boundary of the Reservation shows, or tends to show that the waters of that river were reserved or intended to be reserved for the use of the Indians. It will be remembered, however, that at the time the agreement was made, all of these lands were unsurveyed. It was necessary to define the boundaries of the Reservation by some natural object. Milk river was selected as the northern boundary because it was a well defined line and the most prominent natural object in that vicinity. If it had been intended to reserve the flow of Milk river as it then existed, and to withhold the waters from appropriation under the laws of the United States and of the State of Montana, by the people who were to settle on the ceded portion of the Reservation, some language would have been inserted in that agreement with reference to the river making evident the intention to provide for the flow of the river in its natural condition.

OBJECTIONS TO RULE THAT TREATY MUST BE CONSTRUED IN FAVOR OF THE INDIANS.

It was contended in the Court below that this agreement should be construed most favorably to the Indians, and that it should be construed, not according to the technical meaning of its words, but in the sense in which the words would be naturally understood by the Indians.

This principle might be true when applied to certain classes of controversies. The controversy here is not between the Government of the United States and trespassers upon the Indian Reservation. In controversies of that character it is customary and proper to construe these treaties and conventions most strongly in favor of the Indians. Here the controversy is between the United States, as guardian of the Indians, and the appellants who are citizens and grantees of the United States, and the controversy has reference to the titles granted by the United States to them. In such case, the appellants are the public in whose behalf the grants must be construed most strongly. The property granted to them by their entry upon and settlement of the public lands of the United States, and the appropriation of the waters flowing in the streams upon or adjacent thereto pursuant to the laws, decisions of the courts, rules and customs of the country, is property of which they cannot be deprived without due process of law, and without just compensations.

These lands, after the Indian title had been extinguished, were thrown open to settlement and occupation, and the right of the State to provide for the appropriation of waters from the streams flowing over them was granted by Congress without any reservation of the flow of the waters in Milk river or its tributaries, for the use of the Indian Reservation, or for any other purpose. The appellants entered upon these lands in reliance upon these grants, settled thereon, and have expended large sums of money in reclaiming them and in the perfection of their title to the lands and water. To take these rights away from them, and to destroy them,

as is attempted to be done in this case, is the taking of private property without any compensation. This, the Court will not do, nor will it construe a statute or agreement to have the effect of doing this act without such being the express terms of the statute or agreement.

The court below based its conclusions upon the rules of construction of Indian Treaties as laid down by this court in the case of Jones vs. Meehan, 175 U. S. 1, in which Mr. Justice Gray, speaking for the Court, says:

"In construing any treaty between the United States and an Indian Tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enligthened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and independent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

But it will be noted that in that case the Court was dealing with an express reservation of a tract of land "set apart" to the chiefs of the Chippewa tribe, who were instrumental

in securing the execution of the treaty, and the question involved was as to whether or not this reservation of land was of the absolute title or merely the right of occupancy, and the controversy was between the Government and the Indians.

The Circuit Court of Appeals also cited with approval the opinion of this Court in United States vs. Winans, 198 U. S. 371. But as we view the facts in that case it does not support the conclusion of the Court below.

In that case there was being considered a treaty in which the Yakima Indians ceded, relinquished and conveyed to the United States all of their right, title and interest in and to the lands and country occupied and claimed by them, reserving from the lands ceded for their own use the tract of land therein described. Article III of the treaty provided in its second paragraph as follows: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

Construing this, Mr. Justice McKenna says: "At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them.

"The pivot of the controversy is the construction of

the second paragraph. Respondents contend that the words 'the right of taking fish at all usual and accustomed places *in common* with the citizens of the territory', confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership."

After reviewing the findings based upon the evidence to the effect that the defendants as owners of land had excluded the Indians from their fishing places, the court reviewing the decision of the court below says: "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to the negotiations and a convention which seemed to promise more, and give the word of the nation for more. * * * The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the exeistence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted. * * There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those

boundaries reserved 'in common with citizens of the territory' * * *'". The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they *possessed* as 'Taking fish at all usual and accustomed places.' "

It will be noticed that the court is here dealing with the construction of a treaty containing a reservation framed in clear and definite terms, whereas, in the treaty in controversy there are no terms applicable to the rights of appropriation at all. The construction of the treaty in the Yakima case is made to turn upon the proposition that the Indians possessed and enjoyed these larger fishing privileges long prior to the making of the treaty, and that they were reserving those privileges to themselves. In the case at bar, at the time of the making of the treaty the Indians were not engaged in agriculture, and no water had ever been appropriated or diverted from Milk river for the purpose of irrigation upon the reservation, or for any other purpose whatsoever. The right to irrigate their lands was not a right possessed by the Belknap Indians at the time of the making of the treaty, nor was it a right which the Indians had ever claimed or exercised. In fact it cannot be seriously contended that the Indians at the present time are desirous of irrigating their lands or converting them to the purposes of agriculture. The irrigation and cultivation of the Indian lands is a policy of the Indian Department, and not a practice of the Indian races. In the Yakima

case the court was dealing with the reservation of the ancient rights and privileges of the Indians. In the Belknap case you are dealing with the policy of the Department which is directly opposed to the entire history, tradition and tendency of the Indian races. In the Yakima case the court was construing express words. In the case at bar the contention of the Government calls for the reading into the treaty of an intention which never existed in the minds of the Indian tribes occupying the reservation.

In the Yakima case the court construed the terms "rights of fishery" to mean the rights as enjoyed and exercised by the Indians from time immemorial. In the Belknap case you are asked to construe "Agricultural pursuits", to mean the practice of agriculture, not as pursued by the Indians, but as developed by the scientists of modern times. Such a construction may be for the best interest of the Indian, but it takes a flight of the imagination to conceive of this idea being in the minds of the Indian signatories to this treaty. In the Yakima case the court construed express words so as to preserve for the Indians a right which they had always possessed, and which they could continue to exercise without any great injury to the lands thrown open to settlement by them. In the Belknap case you are asked to read into the treaty an intention to confer upon the Indians a right which they had never exercised, did not then claim, and would not now exercise but for governmental compulsion, and which when exercised would destroy the value of every acre of land ceded by them to the United States, and lay waste thousands and thousands of acres made fertile by the labor and expenditure of settlers who had gone upon them under express authority from the govern-

ment. Mr. Justice McKenna says, "How the treaty in question was understood may be gathered from the circumstances." This is a rule well settled in its application to the construction of all written instruments. But it does not overturn express words. It is only when ambiguous words are used that it is invoked. Here there are no ambiguous words upon which the circumstances can throw light. The cession is of all of the right, title and interest of the Indians in the lands thrown open to settlement. Can it be said that the circumstances of the case requires a court of justice to imply a limitation upon that grant which would destroy its most valuable element?

We invite the attention of the Court to the case of the

United States vs. Choctaw Nation, 179 U. S. 494,

as expressing the rule governing the case at bar.

In that case the following provision of the treaty was under consideration :

"The Choctaws and Chickasaws, in consideration of the sum of $300,000.00 hereby *cede* to the United States the Territory West of the ninety-eighth degree of West longitude, known as the Leased District."

It was contended that the lands were conveyed in trust. The proposition considered, as stated by the Court was: "Did that treaty make an absolute, unconditional cession to the United States of these lands, free of any trust, express or implied?" The Court, among other things, said:

"There was much discussion at the bar as to the principles which should govern the Court when determining the scope and effect of a treaty between the United States and Indian tribes."

"All agree that, as a general rule, in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument, and place the Court in the situation in which the parties stood when they signed the writing to be interpreted.

To what extent, if at all, have these rules been enlarged or modified, when the instrument to be interpreted is a treaty between the United States and Indian tribes?"

Then the Court comments upon the case of Jones vs. Meehan, and other cases, and then said:

"But in no case has it been adjudged that the Courts could, by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the Court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the court of claims or this court

with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing."

The Court then quoted, with approval, as applicable to Indian treaties, the language of Judge Story, in

The Amiable Isabella, 6 Wheat. 1,

as follows :

"In the first place, this court does not possess any treaty making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. * * * In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties,

and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals."

The Court then discussed other cases, announcing a similar doctrine, and referring to the treaties then under consideration, said:

"But if the words used in the treaty of 1899, reasonably interpreted, import beyond question an absolute unconditional cession of the lands in question to the United States, free from any trust, then the Court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court, the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts, not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the government to determine."

Then commenting upon the language of the treaty, the court said: the words used in the treaty "so clearly exclude the idea of trust in reference to the lands, that a different meaning cannot be attached to them without doing violence to the words used by the parties."

"The treaty * * * contains no word or clause, qualifying or limiting the absolute cession of the territory. If the parties to it intended that the lands constituting that district should continue to be held and used by the United States as they were then held and used, the treaty would not have declared, without qualification, that the Choctaws and Chickasaws 'hereby cede' to the United States the territory known as the Leased District,

and omitted all words that would, under the most liberal interpretation, either import a continuation of the lease, then existing, or any trust connected with the territory ceded. * * *

"If the Indians intended, so far as they were concerned, to pass an absolute unencumbered title to the United States, it would, we think, have been impossible to employ language more appropriate to that object than is to be found in the treaty of 1866. Our convictions upon this point are so decided that we feel constrained to say that if some of the parties had not been Indians, it would never have occurred to any one that the cession of territory made by that treaty was attended by conditions in the nature of a trust. While the dependent character of the Indians makes it the duty of the Court to closely scrutinize the provisions of the treaty and to interpret them 'in the light of the larger reason of the superior justice that constitute the spirit of the law of nations, (Choctaw Nation v. United States, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75), the court must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy. We may repeat, that if wrong was done to the Indians by the treaty of 1866, interpreted as we have indicated—and we are not to be understood as expressing the opinion that they were not under all the circumstances fairly dealt with—the wrong can be repaired by that branch of the government having full power over the subject." * * *,

"It is not for the judiciary to defeat the will of the legislative branch of the Government by giving to an

Indian treaty a meaning not justified by its words. * * *

"What it (the government) needed, perhaps what it required—at any rate what it obtained—was an unqualified cession of the territory, unaccompanied by any declaration as to the use intended to be made of it, or by any words qualifying the absoluteness of the title passed to the United States. It took an absolute cession, without any declaration as to the uses to which the territory ceded was to be devoted."

In that case, only the words, "hereby cede" were used in the treaty, and it was held that there was no reservation, but that an absolute, unconditional, unencumbered title was conveyed to the United States.

In the case at bar, they used in the agreement the words "hereby cede and relinquish to the United States all their right, title and interest in and to all the lands embraced within the aforesaid * * * reservation, not herein specifically set apart and reserved, * * * reserving to themselves *only* the reservation herein set apart, for their separate use and occupation."

This language absolutely excludes any reservation, or the idea that there was an intent or purpose to reserve anything. Under the decision in the Choctaw case, the word "*cede*" was construed to convey, without reservation, an absolute, unconditional and unencumbered title. Here they "cede and relinquish all their right, title and interest in and to the lands," making it clear that nothing was reserved. They not only used language conveying an absolute title, but, to make it more emphatic, they further declared that they conveyed all, "reserving to themselves only the reservation herein set apart for their separate use and ocupation."

If the Indians intended to pass an absolute, unconditional and unencumbered title to that land to the United States, stronger, clearer, or more appropriate language could not have been used. If it were intended to reserve anything, some language would have been inserted qualifying the language used, or in some way limiting the grant to the Government. The Indians fully understanding the terms of the agreement, did "hereby cede and relinquish to the United States, all their right, title and interest, in and to all the lands embraced within the aforesaid * * * Reservation, not herein specifically set apart and reserved as separate reservations for them * * * reserving for themselves *only* the reservation herein set apart for their separate use and occupation." They thus ceded and relinquished to the Government an absolute and unencumbered title to those lands, without any proviso, qualification or reservation.

The Indians declared that the terms of the agreement were explained to them, and that they fully understood them. Two interpreters, one acting for the Government, and one for the Indians, declared that the agreement was fully explained to the Indians, and that they understood it. There is no allegation in any of the pleadings, or evidence before the Court showing, or tending to show that the Indians did not understand the terms of the agreement.

There is nothing before the Court for construction or interpretation, but the plain, unambiguous language of the agreement, and that is so clear that it does not require any construction or interpretation.

Until the commencement of this suit, it was never claimed that there was any reservation of the waters of Milk

river, for use on the Reservation. In fact, at the commencement of this suit, it was not so claimed, because there is no allegation in the bill of complaint that the waters were reserved. The Commissioners, who negotiated the agreement, and the Congress that ratified it, understood that there was no reservation, and that there was an absolute grant of these lands.

Section III of the Act ratifying the agreement, declares that these lands were a part of the public domain, and open to settlement under the general land laws. That Act was in the nature of a grant to the public, inviting persons to settle upon, and reclaim those lands. When a person accepted the provisions of that Act, and settled upon the lands, the grant became effective, and the Government cannot withdraw or in any manner restrict the terms of that grant, or modify its provisions. The appellants, relying upon the plain provisions of the Act, settled upon these lands in good faith, appropriated waters to reclaim them, did reclaim them, and established civilized communities in that country. The public accepted the agreement and the Act ratifying it, according to the language used. It would be great injustice to now deprive these settlers of the use of said waters.

If we depart from the plain meaning of the language used in the agreement, and the Act of Congress ratifying the same, and would try to arrive at the meaning of the parties, by examining the surrounding conditions, it would be more reasonable to suppose that the parties intended that the waters on the lands opened for settlement, were subject to appropriation, for the purpose of reclaiming those lands.

It is shown in the answer, and, for the purpose of this

case, it must be taken as true, that there are numerous streams upon the Reservation, having an aggregate flow of 1900 inches of water. It is more reasonable to believe that it was the intention of all parties that the waters on the lands opened for settlement should be open to appropriation, to reclaim those lands, and that the waters on the Reservation could be used for the purpose of reclaiming the lands on the Reservation. It is clear that the Indians did not understand or believe that there was any reservation of the waters of Milk river for their use.

It would be against public policy to hold that the agreement with the Indians contains a reservation of the use of the waters of Milk river. If it is so held in this case the same rule will apply to every Indian reservation that has been opened to settlement, and the waters of any stream bordering upon or running through any Reservation cannot be appropriated by white settlers. Surely it was not the intention of the officers of the Government or Congress, in dealing with the Indians in opening these Reservations to settlement to withhold the waters on the lands ceded by the Indians from appropriation for useful and beneficial purposes under the state laws. To so hold would be to give to Congress the intention of taking the waters of these streams and attaching them permanently to the lands reserved for the use of the Indians, while the lands purchased by the Government from the Indians and thrown open to settlement would remain a desert waste. If these waters are reserved for the use of the Indians they will become appurtenant to the lands reserved for the Indians, and when the Reservation is finally thrown open for settlement these lands would have the right to use water appurtenant to them, while the lands

previously purchased from the Indians, and previously settled, would be without any such right. There is nothing in the policy of the Government or in the history of its dealings with the public lands to indicate any such intention on the part of Congress.

RULE THAT GRANT MUST BE CONSTRUED IN FAVOR OF GRANTOR.

It was contended in the Court below that a grant from the Government should be construed strongly in favor of the grantor. This rule has been to some extent adopted by this Court.

There are, however, many exceptions to the rule. Mr. Justice McLean in his dissenting opinion in the Charles River Bridge Case, 11 Pet. 420, thus states the rule: "The broad rule thus laid down cannot be sustained by authority. If an office be granted by name all the immunities of that office are taken by implication. Whatever is essential to the enjoyment of the thing granted must be taken by implication and this rule hold good whether the grant emanate from the royal prerogative of the King in England or under an act of legislation in this country."

And Mr. Justice Story thus states the rule: "The rule is not disputed. But it i s a rule of very limited application. To what cases does it apply? To such cases only where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent. objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the

reason (says common law) "that it will be more for the benefit of the subject, and the honor of the king, which is to be more regarded than his profit." (Com. Dig., Grant, G., 12; 9 Co. R., 131 a; 10 Co. R., 67, b; 6 Co. R., 6). And in every case, the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And, if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced."

Where there is no ambiguity on the face of a grant there is no rule of law to authorize the Court to depart from the grant to obtain evidence to vary, contradict or limit it.

United States v. Fossat, 20 How. 413.

In this case there is no uncertainty or ambiguity in the terms of the grant. The land was declared to be a part of the public domain and open to settlement under the homestead and desert land act. To acquire land under the desert land act, to make the land productive and habitable, it was absolutely necessary to appropriate waters for the purpose of irrigation. There was no source from which such water could or can be obtained excepting from Milk river and its tributaries. Without the use of those waters the land thrown open to settlement would be practically worthless and a civilized community could not be established or maintained thereon.

When the land was declared to be a part of the public domain it immediately became subject to the laws of Congress and the laws, rules and decisions of Montana, in relation to the approriation of water. When the land thus became subject to those laws, rules and decisions there was not any ambiguity or uncertainty about the meaning

of the grant or the rights of persons settling upon those lands to appropriate the waters of the streams flowing thereon or adjacent thereto.

The rule of construction of grants in favor of the Government has been applied only to cases where a grant was made to an individual or to a State.

In this case the grant was not made to an individual or a State. The law gave to the people who constituted the Government the right to go upon the land and acquire title to the same under the provisions of the law, if they chose to avail themselves of the privilege. The object of the law was to open the land for settlement and to establish civilized communities thereon. It was not intended to read into the agreement of the Indians and the act throwing open the land to settlement some reservation or provision that would render the land uninhabitable.

In controversies relating to property rights the Government has the same standing before the Court, no greater and no less, than a private individual or corporation. The rule is thus stated by Mr. Justice Hunt in

People vs. Brandreth, 36 New York, 191,

quoting from Page 197; that, "When it becomes a suitor, it waives for the time, its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the courts, and to its practice proceedings. For this purpose, it is like an individual or inferior corporation, and becoming voluntarily a party to a suit, no good reason can be given why it should not be bound by the same rules that are applicable to other parties in the same position." The same rule was announced by the Supreme Court of

the United States, in

United States vs. Arredendo, 6 Peters, 711;
United States vs. Bank of Metropolis, 15 Peters, 307.

See also

Kean vs. Calumet Canal & Imp. Co., 190 U. S. 952.
State ex rel Lewis vs. Dennis, 39 Kansas, 516;
Metzel vs. State, 16 Wisconsin, 370;
Sholes vs. State, 2 Wisconsin, 499;
3rd Hamilton's Works, Page 518;
Deming vs. United States, 1st Court of Claims, Rep. 1;
Carr vs. United States, 22 Court of Claims, Rep. 158;
Cape Anne Granite Co. vs. U. S. 20 Court of Claims, Rep. 11;
In Re Southern Pacific Ry. Co. 28 Court of Claims, Rep. 105;
Choctaw Nation vs. U. S., 20 Court of Claims, Rep. 104.

RESERVATION IF ANY WAS REPEALED BY ACT ADMITTING MONTANA AS A STATE.

By the Act of Congress passed and approved February 22, 1889, for the admission of Montana into the Union the inhabitants of the Territory of Montana were authorized to form a constitution, and upon its approval by the President the State of Montana was to be admitted into the Union "upon an equal footing with the original states." Any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk river were not to be the subject of appropriation

by the citizens and inhabitants of the said state was repealed by the Act of Admission.

Ward vs. Race Horse, 163 U. S. 504, 515.

Thomas vs. Gay, 169 U. S. 264, 270.

United States vs. McBratney, 104 U. S. 621.

In the case of Ward vs. Race Horse, 163 U. S. 504, this court was dealing with a Treaty made with the Bannack Indians in 1869, in which it was provided that "they should have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians upon the borders of the hunting districts." It was held by this court that the Act admitting the territory of Wyoming into the Union as a state repealed that part of the Treaty above mentioned, and that the state had a right to pass laws regulating the hunting of game upon the public lands within its borders, which laws would apply to the Indians.

In Thomas vs. Gay, 169 U. S. 264, this Court was dealing with a Treaty with the Cherokee Indians, in which it was provided that the lands so granted should not, without the consent of the Indians at any future time, be included within the territorial limits or jurisdiction of any state or territory, and it was by this Court held that the Act of Congress creating the territory of Oklahoma, and including in its boundaries the lands occupied by the said Indians, as their reservation, without containing the provision excluding the reservation from the territorial jurisdiction of the territory of Oklahoma, repealed the previous Treaty with the Indians, and this court there laid down the rule "it is well settled that an Act of Congress may supercede a prior Treaty and that any ques-

tions that may arise are beyond the field of judicial cognizance and must be met by the political department of the Government."

It is now no longer an open question in this court that lands within the boundaries of Indian Reservations constitute a part of the state for all purposes excepting that the Government retains jurisdiction there for the purpose of dealing with the Indians and punishing the crimes committed against the Indians, and making such rules and regulations for the management of the Indians as may seem best. For all other purposes such reservations are a part of the state and subject to its laws.

United States vs. McBratney, 104 U. S. 621.
Utah N. R'y. Co. vs. Fisher, 116 U. S. 28.
United States vs. Draper, 164 U. S. 240.
Thomas vs. Gay, 169 U. S. 264.
Wagner vs. Evans, 170 U. S. 588.

In addition to the Act of Congress admitting the territory of Montana into the Union there is also the Act of Congress ratifying the agreement with the Indians.

25 U. S. Stat. p. 113.

By this Act Congress declared that the ceded lands were a part of the public domain. If there were any conflict between the agreement as signed by the Indians and the Act of Congress ratifying the treaty, the Act of Congress would prevail.

Lone Wolf v. Hitchcock, 187 U. S. 553.

When the agreement was made with the Indians and that agreement was ratified by Congress, the lands on the north side of Milk river, which are the lands occupied by appellants, were declared to be a part of the public domain, as were a part of the lands on the south side. The

lands described as constituting the Fort Belknap, Fort Peck and Blackfeet reservations were reserved for the use of the Indians. The Government was the owner of all of the lands, those declared to be a part of the public domain, as well as those reserved for the use of the Indians. The Government was in the attitude of a private owner of these lands. They were all subject to the laws of the territory of Montana, and after the state of Montana was admitted into the Union upon an equal footing with the rest of the states, they all became subject to the laws of the State of Montana, in so far as those laws were applicable to the conditions there existing.

Kansas vs. Colorado, 206 U. S. 46.

Kean vs. Calumet Canal & Improv. Co., 190 U. S. 452.

Hardin vs. Shedd, 190 U. S. 508.

Martin vs. Waddell, 16 Peters, 367.

Pollard vs. Hagan, 3 How. 212.

Goodtitle ex dem. Pollard vs. Kibbe, 9 How. 471.

Barney vs. Keokuk, 94 U. S. 324.

St. Louis vs. Myers, 113 U. S. 566.

Packer vs. Bird, 137 U. S. 661.

Hardin vs. Jordan, 140 U. S. 371.

Kaukauna Water Power Co. vs. Green Bay & M. C. Co., 142 U. S. 254.

Shively vs. Bowlby, 152 U. S. 1.

St. Anthony Falls Water Power Co. vs. St. Paul Water Comrs., 168 U. S. 349.

Whitaker vs. McBride, 197 U. S. 510.

Lowndes vs. Town of Huntington, 153 U. S. 1.

Farnham on Waters, Stc. 50.

Grand Rapids I. & R. Co. vs. Butler, 159 U. S. 87.

Before Montana was admitted as a State, the rules and customs established by the people and the laws and decisions of the Courts of the Territory controlled the right to the use of the waters of the non-navigable streams in the Territory. These rules, customs, laws and decisions were recognized in the case of

Basey vs. Gallagher, 20 Wallace, 670.

This is true of necessity, because there was not and is not any Act of Congress on the subject, excepting its Acts granting the right to appropriate waters on the public domain, and in the United States there is no common law, except that which is adopted and recognized by the Legislatures and Courts of the respective States and Territories.

Smith vs. Alabama, 124 U. S., 465.

Bucher vs. Cheshire Railroad Co., 125 U. S. 555.

Penn. vs. Bridge Co., 13 How., 518.

Wheaton vs. Peters, 8 Peters, 591.

WATERS OF MILK RIVER SUBJECT TO STATE LAWS UNLESS EXPRESSLY RESERVED.

This court has recently had before it in a very important case the relation of the United States to the waters of streams in the arid regions, within the boundaries of states, and after a most exhaustive investigation has announced the rule with reference to the appropriation of water for irrigation, that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters; and that the United States as the owner of arid lands within those states possesses no sovereign power over those waters which will enable it to set aside or control appropriations of water made in accordance with state laws.

Kansas vs. Colorado, 206 U. S. 46.

In the opinion in that case Mr. Justice Brewer distinguishes the case at bar from the case of the United States vs. Rio Grande D. & I. Co., 174 U. S. 703, in which latter case the United States was exercising the sovereign power granted to it by the constitution to control the flow of navigable streams so as not to interfere with inter-state commerce, or commerce with a foreign nation. Here we have a stream, Milk river, admittedly not navigable, and the government comes into court, not as a sovereign, but as a private suitor, owner of the lands bordering on the stream, seeking to control the waters of the river as against its own citizens to whom it had previously granted lands upon condition that they appropriate these same waters under state laws. By the decision of this Court in the Kansas-Colorado case it was held that the government as the owner of arid, public lands within the state, which it desired to reclaim, could not intefere with appropriations of water under state laws. The fact that the government, which is the owner of the land included within the Reservation, desires to reclaim the lands as a part of its policy of civilizing the Indians does not give it any greater right to the waters of the stream. The purpose of the government in reclaiming its lands does not add to or take away from its rights in the streams. When the State of Montana was admitted into the Union the waters of Milk river were not reserved from its control. The United States does not possess the sovereign power to now retake them.

COMMON LAW DOCTRINE OF RIPARIAN RIGHTS WAS NEVER RECOGNIZED IN MONTANA.

The bill of complaint is not framed upon the theory

that the common law doctrine of riparian rights prevails in Montana. The rights set forth in the bill are based solely upon appropriations and diversions of waters from the stream. The first right is claimed under an appropriation and diversion made by means of pumps, pipes and waterways, whereby the waters were appropriated and diverted from the channel of the river and conveyed to the agency buildings for use. (Trans. p. 4.)

And the second right is based upon an appropriation and diversion made July 5, 1898, by means of canals, ditches and waterways, whereby a quantity of water was diverted from the channel of the river. (Trans. p. 4.)

No reference is made to riparian rights except by way of recital in the ninth paragraph. (Trans. p. 6.)

Yet it was contended in the Circuit Court and Circuit Court of Appeals that the complainant is entitled as riparian proprietor to the uninterrupted flow of the waters of Milk river. This claim was made under the theory that the doctrine of riparian rights exists in this State.

RIPARIAN RIGHTS.

The doctrine of riparian rights as it existed at common law never prevailed and was never recognized by the people, legislature or Courts of Montana.

The first settlers in the Territory encountered conditions unlike those to which they were acustomed in the eastern states. The climate was dry and the soil was arid and unproductive unless irrigated. By the application of water the soil became productive and produced bountiful crops. Those engaged in mining required water to work their mines. To irrigate their lands and work their mines, ditches were constructed and water diverted and conveyed to the lands to be cultivated

or mined. In diverting the water the common law riparian rights of persons living, or having land, lower down on the stream were ignored. First in time, first in right, was the rule that prevailed as to the use of water.

It is a matter of common knowledge in this state that even before the Territory was organized ditches were constructed, sometimes many miles in length, conveying water from streams for the purpose of irrigating land and operating placer mines. In many cases these ditches conveyed the water beyond the water shed of the streams from which they were taken.

From the earliest settlement of the Territory the people realized that the common law doctrine of riparian rights was not applicable to the climatic conditions existing in this country, and were detrimental to the development of its resources and to the welfare and prosperity of the people. They never recognized or claimed rights as riparian proprietors. It is a significant fact that although the right to the use of water has always been a fruitful source litigation in this State and that the litigants and their Attorneys do not overlook any grounds on which can be based the right to the use of water, not one case has been presented to the Supreme Court in which either party claimed or in any way asserted any rights as riparian proprietor, or presented any issue relating to riparian rights. This shows conclusively that the people ignored and abandoned all claims to such rights and based their claims to the use of water solely on diversion, appropriation and application to a beneficial use.

When a territorial form of government was established, and a Legislature elected, the diversion and appropriation of water was one of the first subjects that engaged the

attention of the Legislative Assembly. The First Legislative Assembly convened on the 12th day of December, 1864, and on the 12th day of January, 1865, an Act was approved providing for the appropriation of water for irrigation and ignored the rights of riparian proprietors.

That there may not be any question in the mind of the Court as to the statutory laws of the Territory and State of Montana, we beg leave to call attention to the following as a complete reprint of the statutes, which have been enacted upon the subject, excepting some laws passed since 1900, and which relate to the administration of the law, and to these laws reference is made.

The first law passed by the Legislative Assembly, was as follows:

An act to Protect and Regulate the Irrigation of Land in Montana Territory.

Be it enacted by the Legislative Assembly of the Territory of Montana:

Sec. 1. That all persons who claim, own or hold a possessory right or title to any land, or parcel of land, within the Boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes.

Sec. 2. That when any person owning claims in such locality has not sufficient length of area exposed to said stream in order to obtain a sufficient fall of water necessary to irrigate his land, or that his farm or land used by him for agricultural purposes is too far removed from

said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes as hereinbefore stated.

Sec. 3. That such right of way shall extend only to a ditch, dyke or cutting sufficient for the purposes required.

Sec. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all.

Sec. 5. That upon the refusal of owners of tracts of land or lands through which said ditch is proposed to run to allow of its passage through their property, it shall be proper for any justice of the peace, upon application being made, and proper notice being given to parties, as in other cases of litigation under the jurisdiction of a justice of the peace, to appoint three commissioners or reviewers, composed of disinterested claimholders within the townships, who shall proceed to view the premises, taking into consideration the necessities and rights of both parties, also the size of the cutting.

Sec. 6. That if the commissioners thus appointed shall think proper, they shall proceed to assess any damage which said ditch may cause to the owner of the lands

though which it passes, taking also into consideration any advantages which he may derive from said ditch.

Sec. 7. That said assessment, upon its proper returns, sworn to and properly certified, the justice of the peace shall proceed to render his judgment, based upon the assessment of the commissioners, as he would do in any action of debt which may come under his jurisdiction, and subject to the like mode of execution and enforcement. In case the damage shall exceed the jurisdiction of the justice of the peace, the commissioners shall report to the probate judge of the county, who shall proceed in the same manner as required of the justice of the peace.

Sec. 8. That all persons on the margin, brink, neighborhood, or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel or other machine, for the purpose of raising water to the level required for the purpose of irrigation, and that the right of way shall not be refused by the owners of any tract of land upon which it is required, subject to the like regulation as required for ditches, and laid down in the preceding sections.

Sec. 9. That said commissioners, as provided for in section five, shall be allowed two dollars each per day for their services.

Sec. 10. That the provisions of the sections of this act shall not conflict with any rights of mills or millmen, or interfere with any milldam, race, or watercouse which already exists.

Sec. 11. That the provisions of this act shall also entail upon the parties using water as provided above, the careful management and control of said water, that in their waste they shall not injure anyone, and if so injured, dam-

ages shall be assessed as hereinbefore provided.

Sec. 12. That this act to take effect from and after its passage.

Approved January 12, 1865.

Laws of Montana, 1864-1865, pp. 367-369.

That law remained in force until 1869, when it was repealed and the law which is hereinafter quoted as Sections 1239 to 1248 inclusive, was enacted, excepting that the proviso contained in Section 1239 was adopted February 21st, 1879. (See Laws of 1869, pp. 57-59. See Laws of 1879 Page 52.)

On January 12th, 1872, there was a revision of the statutes of Montana and the Act of 1869 was embodied in the new statutes, and what is here printed as Section 1249 was adopted. (See Session Laws, 1871-1872, pp. 498-500.)

On February 16th, 1877, Sections 1263 to 1266 were enacted. (See Session Laws of 1877, pp. 406-407.)

On February 21st, 1879, the proviso contained in Section 1239 as here printed was added. (See Session Laws, 1879, page 52.)

In 1879 a new revision of the statutes was made and sections 1239 to 1249 inclusive, and 2163 to 1266 inclusive, as hereinafter quoted were embodied in the Revised Statutes. (See Revised Statutes, 1879 p. 562.)

On March 12th, 1885, what is here printed as Sections 1250 to 1262 inclusive, were enacted.

(See Session Laws 1885, pp. 130-133.)

In 1887, the statutes of Montana were again revised and compiled and the law relating to water rights then in force was embodied therein and is as follows:

Sec. 1239. Any person or persons, corporation or company who may have or hold a title, or possessory right or

title, to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said Territory for the purposes of irrigation and making said lands available for agricultural purposes to the full extent of the soil thereof.

(Sec. 2, Act of 1869, Sec. 1 Statutes of 1872.)

Provided, That in all cases, where, by virtue of prior appropriation any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream for such purpose of irrigation, and there shall at any time be a surplus of such water so diverted, over and above what is actually used for such purpose by such prior appropriator, such person shall be required to turn and cause to flow back into such stream such surplus water, and upon failure so to do, within five days after demand being made upon him in writing by any person having a right to the use of such surplus water, such person, so diverting the same, shall be liable to the person aggrieved thereby in the sum of twenty-five dollars for each and every day, such water shall be withheld after such notice; to be recovered by civil action by any person having a right to the use of such surplus water.

(Sec. 1, Act Feb. 21, 1879.)

(Sec. 1239, Sec. 731 Statutes, 1879.)

Sec. 1240. When any person or persons, corporation or company, owning or holding land as provided in Section 1239 of this chapter, shall have no available water facilities upon the same, or whenever it may be necessary to raise the waters of said stream or creek to a sufficient

height to so irrigate said land, or whenever such lands are too far removed from said stream to use the waters thereof as aforesaid, such person or persons, corporation or company, shall have the right of way through and over any tract or piece of land for the purposes of conducting and conveying said water by means of ditches, dykes, flumes, or canals, for the purpose aforesaid.

(Sec. 3, Act 1869; Sec. 2, Statutes 1872; Sec. 732 Statutes 1879.)

Sec. 1241. Such right to so dig and construct ditches, dikes, flumes and canals over and across the lands of another, shall only extend to so much digging, cutting or excavations as may be necessary for the purposes required.

(Sec. 4, Act. 1869; Sec. 3 Statutes, 1872; Sec. 733 Statutes 1879.)

Sec. 1242. In all controversies respecting the rights to water, under the provisions of this chapter, the same shall be determined by the date of the appropriation, as respectively made by the parties.

(Sec. 5, Act 1869; Sec. 5 Statutes 1872; Sec. 734 Statutes 1879.)

Sec. 1243. The waters of the streams or creeks of the territory may be made available to the full extent of the capacity thereof for irrigating purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator, so as to render the same unavailable.

(Sec. 6, Act 1869; Sec. 5 Statutes 1872; Sec. 735 Statutes 1879.)

Sec. 1244. Any person or persons, corporation or com-

pany, damaging or injuring the lands or possessions of another, by reason of cutting or digging ditches or canals, or erecting flumes, as provided by Section 1240 of this chapter, the party so committing such injury or damage shall be liable to the party so injured therefor.

(Sec. 7, Act 1869; Sec. 6 Statutes 1872; Sec. 736 Statutes 1879.)

Sec. 1245. This chapter shall not be construed as to impair or in any way or manner interfere with the rights of parties to the use of the water of such streams or creeks acquired before its passage.

(Sec. 8, Act 1869; Sec. 7 Statutes 1872; Sec. 737 Statutes 1879.)

Sec. 1246. This article shall not be so construed as to prevent or exclude the appropriators of the waters of the said streams or creeks for mining, manufacturing, or other beneficial purposes, and the right also to appropriate the same is hereby equally recognized and declared.

(Sec. 9, Act 1869; Sec. 8 Statutes 1872; Sec. 738 Statutes 1879.)

Sec. 1247. Any person or persons, corporation or company, who may dig and construct ditches, dikes, flumes or canals, over or across any public roads or highways, or who use the waters of such ditches, dikes, flumes or canals, shall be required to keep the same in good repair at such crossings or other places where the water from any such ditches, dikes, flumes or canals may flow over, or in anywise injure any roads or highways, either by bridging or otherwise.

(Sec. 10, Act 1869; Sec. 9 Statutes 1872; Sec. 739 Statutes 1879.)

Sec. 1248. Any person or persons, offending against

section 1247 of this chapter, on conviction thereof, shall forfeit and pay for every such offense a penalty of not less than twenty-five dollars, nor more than one hundred dollars to be recovered, with costs of suit, in civil action, in the name of the Territory of Montana, before any Court having jurisdiction; one-half of the fine so collected shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed, and the other half shall be paid to the person or persons informing the nearest magistrate that such offense has been committed. All such fines and costs shall be collected without stay of execution, and such defendant or defendants may, by order of the Court, be confined in the county jail until such fine and costs shall have been paid.

(Sec. 11, Act 1869; Sec. 10 Statutes 1872; Sec. 740 Statutes 1879.)

Sec. 1249. In all controversies respecting the right to water in this Territory, whether for mining, manufacturing, agricultural, or other useful purposes, the rights of the parties shall be determined by the dates of appropriation respectively, with the modifications heretofore existing under the local laws, rules, or customs and decisions of the Supreme Court of the territory.

(Sec. 11, Statutes 1872; Sec. 741 Statutes 1879.)

(Note.—Sections 1239 to 1248, Act of 1869, excepting proviso in Sec. 1239, Act of Feb. 21st, 1879. Sec. 1249, Act of Jan. 12, 1872. See Compiled Statutes of 1872, pp. 498-500; Statutes of 1879, pp. 562-565.)

Sec. 1250. The right to the use of running water flowing in the rivers, streams, canyons, and ravines of this territory, may be acquired by appropriation.

(Sec. 1, Act 1885.)

Sec. 1251. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

(Sec. 2, Act 1885.)

Sec. 1252. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

(Sec. 3, Act 1885.)

Sec. 1253. The water appropriated may be turned into the channel of another stream and mingled with its waters, and then be reclaimed; but, in reclaiming it, water already appropriated by another must not be diminished in quantity, or deteriorated in quality.

(Sec. 4, Act 1885.)

Sec. 1254. As between appropriators the one first in time is first in right.

(Sec. 5, Act 1885.)

Sec. 1255. Any person hereafter desiring to appropriate water must post a notice in writing in a conspicuous place at point of intended diversion, stating therein:

First: The number of inches claimed, measured as hereinafter provided.

Second: The purpose for which it is claimed and place of intended use.

Third: The means of diversion, with size of flume, ditch, pipe, or aqueduct, in which he intends to divert it.

Fourth: The date of appropriation.

Fifth: The name of appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county recorder of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion on such stream with reference to some natural object or permanent monument. The recorded notice shall be verified by the affidavit of the appropriator, or some one in his behalf, which affidavit must state that the matters and things contained in the notice are true.

(Sec. 6, Act 1885.)

Sec. 1256. Within forty days after posting such notice the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

(Sec. 7, Act 1885.)

Sec. 1257. A failure to comply with the provision of this chapter deprives the appropriator of the right

to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this act, the right to the use of the water shall relate back to the date of posting the notice.

(Sec. 8, Act 1885.)

(These sections were originally a part of the Act of the Legislature of the Territory of Montana, March 12, 1885, and have since been carried in to the codification of the laws of the State of Montana in force July 1, 1895, as sections 1880 to 1888, both inclusive of the Civil Code of the State of Montana.)

Sec. 1258. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this act, file in the office of the recorder of the County in which the water right is situated a declaration in writing, except notice be already given of record as required by this act, the same facts as required in the notice provided for record in Section 1255 of this chapter, such declaration shall be verified as required in Section 1255 of this chapter, in cases of notice of appropriation of water: Provided, That a failure to comply with the requirements of this section may in nowise work a forfeiture of such heretofore acquired rights nor prevent any such claimant from establishing such rights in the courts.

(Sec. 9, Act 1885.)

Sec. 1259. The record provided for in Sections 1255 and 1258 of this chapter, when duly made, shall be taken and received in all the courts of this territory as prima facie evidence of the statements therein contained.

(Sec. 10, Act 1885.)

Sec. 1260. In any suit hereafter commenced for the

protection of rights acquired to water under the laws of this territory, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such actions, and the court may in one decree settle the relative priorities and rights of all the parties to such suit. When damages are claimed for the wrongful diversion of water in any such suit, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves.

In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same is asked by the parties to the action, the courts shall hear and determine such controversy as if the same were several as well as joint.

(Sec. 11, Act 1885.)

Sec. 1261. The recorder of such county must keep a well-bound book, in which he must record the notices and declarations provided for in this act, and he shall be entitled to have and receive the same fees as are now or hereafter may be allowed by law for recording instruments entitled to be recorded.

(Sec. 12, Act 1885.)

Sec. 1262. The measurement of water appropriated under this chapter shall be conducted in the following manner: A box or flume shall be constructed with a headgate placed so as to leave an opening of six inches between the bottom of the box or flume and the lower edge of the headgate, with a slide to enter at one side of and of sufficient width to close the opening left by the headgate,

by means of which the dimensions of the opening are to be adjusted. The box or flume shall be placed level and so arranged that the stream in passing through the aperture is not obstructed by back water or an eddy below the gate; but before entering the opening to be measured the stream shall be brought to an eddy, and shall stand three inches on the headgate and above the top of the opening. The number of square inches contained in the opening shall be the measure of inches of water.

(Sec. 14, Act 1885.)

Note.—Sections 1250-1262, Act of March 12, 1885.

Sec. 1263. That any person or persons, company or corporation, having the right to use, sell or dispose of water, and engaged in using, selling or disposing of the same, who shall have a surplus of water not used, or sold, or any person or persons, corporation or company, having a surplus of water, and the right to sell and dispose of the same, shall, and they or it are hereby required, upon the payment or tender to the person entitled thereto, an amount equal to the usual and customary rates per inch, to convey and deliver to the person or persons, company or corporation, such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water shall exist and said payment or tender made as aforesaid.

(Sec. 1, Act 1877; Sec. 744 Statutes 1879.)

Sec. 1264. Any person or persons, corporation or company, desiring to avail themselves of the provisions of this chapter, shall, at their own cost and expense, construct or dig the necessary flumes or ditches, to receive

and convey the surplus water so desired by it or them and shall pay or tender to the person or persons, corporation or company having the right to the use, sale or disposal thereof, an amount equal to the necessary costs and expense of tapping any gulch, stream reservoir, ditch, flume or aqueduct, and putting in gates gauges or other proper and necessary appliances usual and customary in such cases and until the same shall be so done the delivery of the said surplus water shall not be required as provided by Section 1263 of this chapter.

(Sec. 2, Act 1877; Sec. 743 Statutes 1879.)

Sec. 1265. That any person or persons, corporation or company, constructing the necessary ditches, aqueducts or flumes and making the payments or tenders hereinbefore provided shall be entitiled to the use of so much of the said surplus water as said ditches, flumes or aqueducts shall have the capacity to carry, and for which payment or tender shall have been made as aforesaid, with all the rights and privileges incidental thereto so long as said unsold or surplus water exists and said payment or tender shall be or have been made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

(Sec. 3, Act 1877; Sec. 744 Statutes 1879.)

Sec. 1266. That nothing in this chapter shall be so construed as to give the person or persons, corporation or company, acquiring the right to the use of water as hereinbefore provided, the right to sell or dispose of the same after being so used by it or them, or prevent the original owner or proprietor from retaking, selling and disposing

of the same in the usual and customary manner, after it is so used as aforesaid.

(Sec. 4, Act 1877; Sec. 745 Statutes 1879.)

(Note.—Sections 1263-1266, Act of Feb. 16, 1877.)

When the State was admitted to the Union it adopted the following article in its Constitution, which was approved by the Act of Congress admitting the State.

(Articles 3, Sec. 15.) "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for ditches, drains, flumes, canals and acqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same shall be held to be a public use."

The preceding section (Section 14), contains the clause that provides that property shall not be taken or damaged for public use, without just compensation having been first made or paid into Court for the owner.

In 1895, the laws of Montana were codified, taking effect July 1, 1895.

The law relating to water rights is contained in the Civil Codes, Division II, Part IV, Title VIII.

Section 1880 same as Section 1250, supra.

By Act approved March 6th, 1901, Section 1880 was amended to read as follows:

Section 1880. The right to the use of any unappropriated water of any natural stream, water course, spring, dry coulee, or other natural source of supply, and of any running water flowing in the streams, rivers, canyons and ravines of this State, may hereafter be acquired by appropriation. (See Laws 1901, p. 52.)

Section 1881 same as Section 1251, supra;
Section 1882 same as Section 1252, supra;
Section 1883 same as Section 1253, supra;
Section 1884, proviso in Section 1239, supra;
Section 1885 same as Section 1254, supra;
Section 1886 same as Section 1255, supra;
Section 1887 same as Section 1256, supra;
Section 1888 same as Section 1257, supra;
Section 1889 same as Section 1258, supra;
Section 1890 same as Section 1259, supra;
Section 1891 same as Section 1260, supra;
Section 1892 same as Section 1261, supra;
Section 1893 same as Section 1262. Supra.

By Act approved March 3rd, 1899, Section 1893 was repealed and the following standard of measurement adopted:

Section 1. Hereafter a cubic foot of water (7.48 gallons) per second of time shall be the legal standard for the measurement of water in this State.

Section 2. Where water rights expressed in miners' inches have been granted, one hundred miners' inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7 gallons) per second; two hundred miners' inches shall be considered equivalent to a flow of five cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miners' inches.

(Session Laws, 1899, page 126.)

Sec. 1894. The right to conduct water from or over the land of another for any beneficial use, includes the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same avail-

able for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use; provided further, that if it is necessity to conduct the water across the right of way of any railroad, it shall be the duty of the owners of the ditch or flume to give thirty days' notice in writing to the owner or owners of such railway of their intentions to construct a ditch or flume across the right of way of such railroad and the point at which the said ditch or flume will cross the railroad, also the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fails to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of said flume or ditch to construct the same across the right of way of such railroad, without further notice to said owner or owners of the railroad.

(Section 1894, Act approved March 18, 1895.)

Sec. 1895. Any person who digs and constructs ditches, dikes, flumes or canals, over or across any public roads or highways, or who uses the water of such ditches, dykes, flumes or canals, is required to keep the same in good repair at such crossings or other places where the water from any such ditches, dykes, flumes or canals may flow over or in anywise injure any road or highway, either by bridging or otherwise.

Section 1896. Any person offending against the preceding section, on conviction thereof shall pay for every offense a fine of not less than twenty-five dollars, nor more than one hundred dollars, with costs of prosecution. One-half of the fine shall be paid into the County Treasury

for the benefit of the comon schools of the county in which the offense was committed and the other haf shall be paid to the person informing the nearest magistrate that such offense has been committed, who shall issue a warrant upon proper complaint being made.

Section 1897 same as Section 1263, supra;

Section 1898 same as Section 1264, supra;

Section 1899 same as Section 1265, supra;

Section 1900 same as Section 1266, supra;

In some of these sections there is a slight change in the wording, but the effect is not thereby changed.

Sections 1901 and 1902 of the Civil Code provide how reservoirs and dams shall be constructed.

By Act approved March 4th, 1905, Sections 1903 and 1904 were added. Section 1903 relates to making surveys and maps and plats of ditches and records of the appropriation.

Section 1904 relates to rules of evidence, making decrees in water right cases, prima facie evidence of the facts found, as against subsequent appropriators.

On March 6th, 1891, an Act was approved providing in part as follows:

Section 1. Whenever the owner, owners or claimants of any agricultural lands of this State shall desire to use the waters of any stream for irrigating or other purposes, and cannot convey the water on to their lands or claims successfully or conveniently without constructing, digging or excavating a ditch, flume or canal across, through, over or under the claims or lands of others, and if the right to construct, dig or excavate such ditch, flume or canal has not been acquired by agreement between him or them and the claimants or owners of the lands or claims over,

under, across or upon which he or they seek to establish such right of way, it shall be lawful for him or them to present to the Judge of the District Court of the State of Montana within and for the county in which such right of way or some part thereof, sought to be enforced is situated, or to which said county is attached for judicial purposes, a petition praying that such right of way be awarded to him or them, such petition shall be verified and contain a particular description of the character and extent of the right sought, and a description of the lands or claims of the petitioner, and the lands or claims to be affected by such right or privilege, with names of the occupants or owners thereof. It may also set forth any tender or offer hereinafter mentioned, and shall demand the relief sought.

Then follow ten additional sections providing for the procedure in Court, manner of appeal and how the expenses shall be paid. (Session Laws, 1891, Page 295.)

This law gives practically the same right as that given in section two of the Act of January 12th, 1865, Section two of the Act of January 12th, 1872, and Section 732 of the Act of 1879, but defines more clearly and explicitly the procedure in Court to obtain the right of way. The provisions of this Act are now embodied in the Code of Civil Procedure, Title VII, under the subject of "Eminent Domain."

Code of Civil Procedure, Secs. 2210-2233.

By Act approved Feb. 27, 1905, the government of the United States was given authority to appropriate water and provision made for filing notice of appropriation.

(Session Laws, 1905, pp. 80-81.)

An Act approved March 9, 1907, provides the manner

of appropriating water on a stream in which water rights had theretofore been adjudicated.

(Session Laws, 1907, pp. 489-494.)

The Acts passed since 1895 not herein copied in full do not contain anything relating to the doctrine of riparian rights.

To prevent a waste of waters, the Legislature by the Act of Feb. 21, 1879, quoted in this brief as the proviso contained in Section 1239, and embodied in the Civil Code as Section 1884, provides that any person having a surplus of water diverted over and above what was actually used shall turn and cause the same to flow back into the stream, so that subsequent appropriators may be enabled to use the water, and a heavy penalty is provided for failure to so return the water after notice served. This requirement to so return the waters of the stream to the channel is not to permit it to flow past the lands of the riparian owner, but to permit it to be used for the purpose of irrigation by subsequent appropriators. It in no way recognizes or protects common law riparian rights.

From the foregoing laws it will be seen that the First Legislative Assembly of the Territory enacted and there has been in force ever since a complete system of laws, defining and regulating the manner in which water may be diverted, appropriated and used and the rights of the respective appropriators determined, protected and enforced.

By these laws, the doctrine of riparian rights was and is ignored and abolished.

The first section of the first Act passed gave the right to use waters upon lands "on the bank, margin or neigh-

borhood of any stream of water, creek or river," and the right to the use of the water to the full extent of the soil.

Section 2 of that Act provided for procuring right of way across other lands for the purpose of constructing ditches to convey water to non-riparian lands.

Section 8 of that Act gave the right to construct upon the lands of others a wheel or other machinery for the purpose of raising water required for the purpose of irrigation.

The next Act passed 1869, quoted in this brief as Section 1239, provided, that any person, persons, corporation or company holding title or possessory right or title to any agricultural lands within the Territory were entitled to the use of the waters of streams or creeks in the Territory to the full extent of the soil thereof.

It does not limit the right to irrigate riparian lands. It extends to lands any place in the Territory. It provided for the construction of works upon the lands of others for the purpose of raising the waters to a sufficient height to convey it to other lands, including non-riparian lands. It provides for obtaining the right of way across the lands of others to construct ditches for the purpose of conveying water to the place of use.

Section 5 of the Act quoted in this brief as Section 1242, provides, that, "In all controversies, respecting the right to water under the provisions of this chapter; the same shall be determined by the date of the appropriation as respectively made by the parties."

By the provisions of that section the rights of riparian proprietors are ignored and the appropriation of water is made the sole test of the right to use it. The appropriation of water as understood and defined by the Courts,

means, the diversion of the water from a stream and its application to a beneficial use.

The next section, Section 6, quoted in this brief as Section 1243, provides, that, "The waters of the streams or creeks of the Territory may be made available to the full extent of the capacity thereof for irrigating purposes without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator."

By the provisions of that section, the right is given to divert and appropriate the waters of a stream without regard to the diminution of the quantity of the water flowing in that stream or deterioration of its quality, and without any reference to the doctrine of riparian rights.

Although there were provisions in the previous law providing that the rights of parties to the use of water should be determined by the date of appropriation, the provisions of Section 11, of the Act of 1872, quoted in this brief as Section 1249, provides, that in all controversies, relating to the use of water for mining, manufacturing, agricultural or other useful purposes, the rights of the parties shall be determined by their respective dates of appropriation, and according to the rules, customs and decisions of the Supreme Court of the Territory. That the question of the diversion and appropriation of water to beneficial purposes was and is an important one to the people of Montana, is shown by legslation upon that subject. Although the laws previously enacted gave the right to appropriate water for beneficial purposes, yet the Legislature in 1885, passed another Act relating to the appropriation of water.

Section 1, of that Act, quoted in this brief as Section

1250, gives the right to appropriate the waters of the rivers, streams, canyons, and ravines in the Territory.

Section 4 of that Act, quoted in this brief as Section 1253, gives the right to turn the waters thus appropriated into another stream and the right to reclaim them, provided, however, that they must not diminish in quantity or deterioratte in quality water already appropriated. No saving clause was inserted to protect the riparian proprietors, in the use of water or to let it flow past their lands.

Section 5 of that Act, quoted in this brief as Section 1254, provides, that as between appropriators first in time shall be first in right.

The history of legislation on this subject shows that the purpose and intent of the people was and is that the waters of the Territory and State might be conserved and applied to a beneficial use not permitted to flow unfettered to the sea. The owners of riparian lands have no right to the use of waters flowing past or through their lands, unless they diverted them and applied them to a beneficial purpose.

In 1877, an Act was passed, providing that any person, company or corporation, having a surplus of water not used or sold shall upon tender of payment of the customary price deliver such water to other persons to the end that they might apply it to a beneficial use.

(That act is quoted in this brief as Sections 1263 to 1266 inclusive.)

When the State was admitted to the Union, the people adopted as a part of their Constitution in the article thereof that is denominated, "A Declaration of the Rights of the People of Montana," a provision that

the use of all water then or thereafter appropriated and the right of way over lands of others for ditches, drains, flumes, canals, aqueducts and reservoirs, is declared to be a public use. This follows the Section declaring that private property shall not be taken or damaged for public use without just compensation.

The people realized that the application of water to a beneficial use is this arid region was one of the most important questions that they had to deal with. They inserted that provision in the Constitution so that upon a change to the state form of government there would not be any constitutional question about the right to condemn lands for the purpose of enabling the people to apply to a beneficial purpose of all waters of the streams and rivers in the State.

When the laws were codified in 1895, a complete code of laws was adopted, embracing the provisions heretofore quoted, regulating and controlling the manner of diverting and appropriating water to a beneficial purpose and defining the rights of appropriators. Since that time other laws have been passed, thus showing how important to the people of this State is the question of the application of water to a beneficial use. From a careful examination of these laws it will be seen that the object of the Legislature was to protect the rights of the people who would divert and appropriate water and apply it to a beneficial use, and that the rights of riparian owners, as such rights existed at common law, were never recognized.

The right to appropriate the waters of the streams in this State is given by these laws, to the fullest extent without regard to deterioration in quality or diminution

of quantity, so long as the rights of prior appropriators are not affected. Riparian ownership is not in any way recognized but all rights to the use of water shall be determined by the date of appropriation. The first in time is the first in right. The right to appropriate water as given by these laws is wholly inconsistent with the doctrine of riparian ownership. Both cannot exist together. The words, "appropriator, appropriation of water, and unappropriated water" have a clear and well defined meaning, which is recognized by Congress, the Legislature of the State and the Courts.

The appellants in this suit have by their pleadings shown a complete compliance with these laws, and also that they complied with the rules and customs of the country, the laws of the State of Montana and the decisions of its Courts.

CUSTOM.

Under the custom established and observed by the people of Montana from the earliest settlement of the Territory, the common law doctrine of riparian rights never prevailed. The only right to the use of water ever acknowledged was the right of the person who diverted the water and applied it to a beneficial use. So important is the use of water to the people of the State in the development of its resources, that the application of water to a beneficial use is the only right that was ever acknowledged or recognized by the people, the Legislature, or the Courts. The common law doctrine of riparian rights never prevailed and was never claimed or recognized. It may be said that the Court will not take judicial notice of these customs. But we have pleaded that we appropriated the water accord-

ing to the customs, laws and decisions of the country; judgment was given against us on the pleadings and for the purpose of this case the allegations must be taken as true. This custom was recognized by this court in 1874 in the cases of Atchison vs. Peterson, 20 Wall 507 and Basey vs. Gallagher, 20 Wall 670.

DECISIONS OF OUR COURTS.

Nor have our Courts in any manner in any case acknowledged or recognized the doctrine of riparian rights. On the contrary, however, they have acknowledged, recognized and enforced to the fullest extent the right and doctrine of appropriation.

If the doctrine of riparian rights was ever recognized or claimed by the people or any person in Montana, it is remarkable that the question has never been presented to the Supreme Court of Montana for adjudication. It was contended by appellee in the Circuit Court and the Circuit Court of Appeals that the Supreme Court of Montana did recognize riparian rights. The decisions which counsel relied upon when examined contain only some *dicta* upon the subject, and that *dicta* when closely analyzed does not recognize the doctrine of riparian rights.

The opinion of a Court or Judge upon a subject not before it for adjudication is not authority upon the question.

In Pollock v. Farmers' Loan & Trust Co., 157 U. S., 429, Mr. Chief Justice Fuller said, "Doubtless the doctrine of stare decisis is a salutory one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue."

"The language of Chief Justice Marshall, in Cohens v. Virginia, 19 U. S. 6 Wheat. 264, may profitably again be

quoted: "It is a maxim not be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point was presented. The reason of the maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In Carroll v. Carroll, 16 How. 275, Mr. Justice Curtis said: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

St. Louis & T. H. R. Co. v. Terre Haute & I. R. Co., 145, U. S. 393.

Any dictum of the Supreme Court of Montana on the subject is not binding on this Court as a construction of the laws of the State of Montana.

The case of Thorpe vs. Freed, 1 Mont. 651, was relied upon as an authority recognizing riparian rights.

In that case were involved the rights of appropriators only. The question of riparian rights was not involved nor was the decision of the Court in any way influenced by the doctrine of riparian rights. In that case eigtheen persons joined as plaintiffs, claiming all the waters of Prickly Pear Creek by virtue of different appropriations and asked for an injunction against the defendants to restrain them from divertiing the waters of the creek. The defendants, whose lands were all above the lands of the plaintiffs, claimed the right to use five hundred inches of water by virtue of an appropriation made by them. The issues raised by the pleadings were priority of appropriation and whether or not the plaintiffs required all the waters of the creek to irrigate their lands. The case was tried by Judge Murphy, who found all the facts against the plaintiffs. Although the question of riparian rights was not involved, the Judge discussed the question in his findings, but the facts relating to appropriation were found against the plaintiffs. On appeal to the Supreme Court, Judge Murphy was disqualified to sit in the Appellate Court. Judge Knowles and Judge Wade, expressed their personal views upon the question of riparian ownership and riparian rights. Upon the issues involved Judge Knowles said: "The material issues have been found against the plaintiff's and in favor of the defendants. There certainly was no error in law for the Court to refuse to grant the injunction asked for by the plaintiffs, unless the defendants in their answer raised no material issue, which it was necessary for plaintiffs to establish in order to entitle them

to recover."

Judge Wade concurred in the affirmance of that judgment upon the grounds stated. Judge Knowles who was a pioneer of the State and a pioneer of Nevada, where the right to appropriate water was recognized, discussed the question of riparian rights and said: "The question of whether or not a law is good for the people of our Territory is a matter for legislative and not judicial consideration. * * * If we were called upon to say what were the necessities of this country in regard to the use of water for the purpose of irrigation, we would reply that there was a demand that water should be used for that purpose, and the considerations of the general welfare of the country, and the principles of natural equity, should guarantee to the prior appropriator of water for such use the first right to use the same to the extent of his necessities for domestic purposes, the quenching of the thirst of himself and animals and for agricultural purposes." * * *

"We hold, however, that the law that is a part of a system of laws, which our legislative assembly have adopted, cannot be annulled or varied by a court through any such considerations. * * *

"The plaintiffs must recover, if at all, upon their rights of appropriation. They have based their rights upon this and not as riparian proprietors. * * *

"Ever since the settlement of this territory, it has been the custom of those who settled upon any portion of the public domain, and devoted any part thereof to the purposes of agriculture, to dig ditches and to turn out the waters of some stream to be used to irrigate the same. This right has been universally recognized by our

people." * * *

"In the second place, has this right been recognized by law?"

Here the Judge quoted section 1 of the Act of 1865, and then said: "This statute was in force at the time the plaintiffs made their appropriation of water, and at the time the act on Congress (Act of 1866) above referred to became law."

"This statute (Act of January 12, 1865), as far as it could, established and recognized the right of appropriation of water for agricultural purposes." * * *

"As far as the legislative assembly of Montana had the power they repealed the common-law doctrine in regard to riparian proprietors."

He then discussed the subject of the recognition of these rights by the Courts and said: "The right to appropriate water for the purpose of irrigation, in our opinion, has been acknowledged and recognized by the customs and laws and decisions of this territory. The law of Congress comes in and says that wherever, by priority of possession, the right to the use of water for these purposes has vested and accrued, the possessors and owners of such vested rights shall be maintained and protected in the same. This is, in effect, a grant to such parties of these rights."

"A grant cannot be divested by a subsequent grant. The words used in section 9 (Act of 1866) were, as I have said, in effect a grant. A grant made by law is as effectual as a grant made by deed or patent, and a subsequent grant of the land would be subject to any previous grant of water right. After a full consideration we are impelled to the conclusion that the right to appropriate

water for the purpose of irrigation stands upon as good, if not a better, footing as the right to appropriate water for mining purposes."

The judgment of the court below, recognizing the right of appropriation for agricultural purposes, was affirmed.

Judge Wade concurred in the opinion by Judge Knowles affirming the judgment of the lower court, He then commented upon the statute and discussed the question of riparian rights and advocated the upholding of those rights as against the doctrine of appropriation. He also commented upon the fourth section of the Act of 1865, as a basis of construing that statute. He evidently overlooked the fact that in the case of Thorpe v. Woolman, 1 Montana, 168, the Court pronounced that section of the statute void, because it conferred judicial powers upon the commissioners. As shown by Montana Reports, Judge Wade presided as Chief Justice of that Court until 1888, and in many subsequent decisions written or concurred in by him he recognized the right of appppropriation and never recognized the doctrine of riparian rights. The case of Thorpe v. Freed was brought under the provisions of the Act of January 12, 1865.

A similar statute was construed by the Supreme Court of Wyoming in the case of Moyer v. Preston, 44 Pac. 845, and the Court quoted the statute as follows: "All persons who claim or hold a possessory right or title to any land or parcel of land within the boundaries of Wyoming territory, when said claim is on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to use the water of said stream, creek or river, for the purpose of irrigation in making said claim available to the full extent of the soil for agricultural

purposes." And said: "The contention is that this statute was sufficient to authorize Moyer to claim the water in question as riparian owner. We entertain a contrary opinion. The statute does not recognize riparian interests. The section quoted above purports to grant the right to the use of the water of any stream, creek, or river for the irrigation of those lands not only lying along the bank of any such stream, but as well those which are in the neighborhood thereof. The subsequent sections of the statute of 1875, however, render it reasonably certain that no rights by that act were accorded to riparian owners as such, but that the same privileges were granted alike to owners of land, whether the same was situated upon the margin of a stream or otherwise. It was provided that "when any person owning claims in such locality" did not possess sufficient fall of water to irrigate his land, or his farm or land "is too far removed from said stream," and "he has no water facilities on those lands," he should be entitled to a right of way for ditch purposes through the tracts of land lying above or below him, or between him and the stream. It was further provided that, whenever the volume of water in any such stream should not be sufficient to supply the continual wants of the entire country through which it passed, commissioners should be appointed to apportion the water "in a just and equitable proportion," and "with due regard to the legal rights of all." It must be apparent that if the same primary right was, under the provisions of that act, recognized or confirmed as to all lands in the locality or neighborhood of a natural stream, regardless of the fact whether or not they were upon the banks of or immediately contiguous to the streams, the matter

of location alone would not have been of the slightest importance in the determination of the real or ultimate rights of the respective owners, as between themselves, but that some other factor must have entered into and determined such right. That other factor could only have been the actual use and application of the water to beneficial purposes. The requirement that the commissioners selected to apportion the water should do so "with due regard to the legal rights of all" must have meant something. Some actual right was recognized, which was not possessed in any equal manner by all owners alike. So far as the mere location of the land was concerned the right was the same, limited only in quantity, perhaps, in respect to the amount of land owned or claimed. The other and actual or more important right to be considered in the apportionment of water must have been, and, in our judgment, was, attached to the use and application or appropriation of the water. This would not only have been unequal in quantity, but also as to time of appropriation; and we are of the opinion that the legal rights of all referred to were the rights secured by prior appropriation."

In Coffin v. Left Hand Ditch Co., 6 Col. 443, a similar statute was under consideration. It was contended that the doctrine of riparian rights prevailed as against the right to priority by appropriation. The Court said: "But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water

in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed. * * *

"We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation."

The same conditions exist in Montana that exist in Wyoming and Colorado. It is all an arid country and requires irrigation. The language used in the foregoing

cases is applicable to the climatic conditions of Montana. To make the lands habitable and develop the resources of the country, the waters must be conserved and applied to a beneficial use.

The District Courts of Montana prior to the case of Thorpe vs. Freed, had recognized the right to appropriate water. The Supreme Court of the Territory had also recognized that right.

Carruthers vs. Pemberton, 1 Mont. 111.
Harris vs. Schantz, 1 Mont. 212.
Columbia M. Co. vs. Holter, 1 Mont. 296.
Wollman vs, Garringer, 1 Mont. 535.
Gallagher vs. Basey, 1 Mont. 457.
Thorpe vs. Woolman, 1 Mont. 168.
Atchison vs. Peterson, 1 Mont. 561.

The cases of Atchison vs. Peterson and Gallagher vs. Basey were affirmed by the Supreme Court of the United States.

In an unbroken line of decisions the Supreme Court of Montana as a territorial court and state court has recognized the right to appropriate water and has never asknowledged or recognized the doctrine of riparian proprietorship or rights.

The case of Smith vs. Deniff, 24 Mont. 20, was relied upon as recognizing riparian rights. The Court in that case did not acknowledge, uphold or recognize riparian rights.

The question of riparian rights was not in issue in the case nor discussed by counsel in their briefs. The facts in that case, as shown by the Reports, 23, Mont. 65; Par. 24, Mont. 20, are as follows: One Cosins was in possession of a part of a section numbered 17, under con-

tract with the Northern Pacific Railroad Company, the owner of the land. He diverted and appropriated water to irrigate one hundred and twenty acres of that land. Thereafter he mortgaged his interest in the land he thus occupied, "together with all water ditches and water rights therewith usually had and enjoyed." Plaintiff, the assignee of the mortgage, foreclosed the mortgage, sold that land and water right and obtained a sheriff's deed. Thereafter Deniff purchased said Section 17 from the railroad company. Smith attempted to divert the water from said Section 17 and was prevented from so doing by the defendant Deniff, who claimed that the water right taken by Cosins became appurtenant to the land. The question presented by the Court as stated by counsel in their brief was: "The question to be solved is, whether or not the water right and ditch in question are on the facts in this case, as matter of law appurtenant to the railroad land, which Cosins occupied."

When the case was first heard the Court held that the water right became and was appurtenant to the railroad land occupied by Cosins, and the defendant, Deniff was entitled thereto.

(Smith vs. Deniff, 23 Mont. 65.)

Mr. Justice Pigott delivered the opinion of the Court.

Later the Court of its own motion granted a rehearing. The question presented in that hearing was, as stated by the Court: "The ultimate question presented for decision is, whether a water right is appurtenant to a certain parcel of land." The question of riparian rights was not in any way involved or presented in that case. All that was said by Mr. Justice Pigott, who wrote the opinion on rehearing, upon the question of riparian rights is

obiter dictum.

It was not necessary to decide or even to discuss the question of riparian rights to reach a decision in that case, nor was it necessary to decide or discuss the steps necessary to make a valid appropriation of water. The question of the validity of the appropriation was admitted by each party and each claimed the water right under that appropiation.

When the language used by Mr. Justice Pigott is analyzed it will be found that the common law rights of the riparian proprietor to the use of the waters of a stream, are not upheld or recognized. He said: "This grant by the Government applies, however, only to the public domain owned by the United States. Therefore, where the absolute right to riparian soil on a stream has passed from the United States before any right to the water by appropriation has become vested in any person, no such right can be acquired afterwards under the grant of Congress; and the common law rule as to the rights of riparian owners would apply, were it not for the fact that the State of Montana has by necessary implication assumed to itself the ownership, *sub modo,* of the rivers and streams of this State, and by Section 1880, et seq. of the Civil Code, has expressly granted the right to appropriate the waters of such streams, which right if properly exercised in compliance with the requirements of the statutes vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this State as owner of the water."

This does not recognize riparian rights. The Judge says: "They would exist were it not for the fact that the State of Montana has by necessary implication as-

sumed to itself ownership, *sub modo*, of the rivers and streams of the State, and has expressly granted a right to appropriate the waters and that right if properly exercised vests in the appropriator the full legal title to the use of such waters, by virtue of the grant made by this State as the owner of the water."

As heretofore shown the State is the owner of the waters in the rivers and streams and all use of such waters is subject to the laws of the State, and when those laws give to the public the right to appropriate these waters and apply them to a beneficial use, the riparian land owner holds his lands subject to that right. The only right he can claim in the waters is by diverting them and applying them to a beneficial use.

What is further said by Mr. Justice Pigott, with reference to riparian land is not in recognition of the rights of a riparian proprietor to the use of the waters of the stream as against an appropriator. He said: "One may not acquire a water right on the land of another without acquiring an easement in such land", but said further, "The right to appropriate water on the land of another for a public use may be obtained thereon by condemnation proceedings under the right of eminent domain, and under Section 15, Article 3 of the Constitution of Montana, the use of appropriated water is made a public use."

All that is said here by the learned Judge is, that a man may not commit a trespass upon the land of another, construct a ditch across his premises and thereby appropriate water from a stream. It is not contended that an appropriation can be made by such trespass. It will be observed, however, that he states that the right to appropriate water on the land of another may be ob-

tained by condemnation proceedings and that under the Constitution of Montana, using water for irrigation is a public purpose.

If a person can by condemnation proceedings make a valid appropriation of waters from a stream upon the lands of another, it must be in derogation of the common law rights of a riparian proprietor. If a person can go above the land of a riparian proprietor and on the state land or public domain divert the waters from a stream he will make a valid appropriation and the riparian owners common law right to have waters flow past his land undiminished in quantity will not prevail.

The learned Judge further discussed the subject of Section 1880 of the Civil Code of Montana, and said that the State gives permission to appropriate waters upon the lands of the State, but it does not give a person permission to go upon the land of another to exercise the rights of appropriation.

In further discussing the subject, Mr. Justice Pigott said: "He has, however, by statutory grant, the privilege of appropriating water upon the public domain or upon land owned by the state; if, however, there is no such land of which he can avail himself for the purpose of appropriating a water right, then of necessity, he must acquire by grant, express or implied (or by condemnation under the power of eminent domain), from some riparian owner the right to exercise the statutory privilege,—that is to say, he must acquire an easement in or a servitude upon the land of another, for, without an easement in or a servitude upon the property of another, B. cannot possibly lawfully acquire a water right; and such can be acquired only by an instrument in writing. In the

case of B. certain distinctions must be kept in mind; the right to an easement in the stream is derived from statutory grant, the means of acquiring this right he must obtain from a riparian owner; the latter embraces two things: (1) The right to divert the water on the land of the grantor; and (2) the right to conduct the water across the land of the grantor."

In that clause the right to acquire water by appropriation is distinctly recognized. It is said, "The right to an easement in the stream is derived from statutory grant," thus the right to appropriate waters in disregard of the rights of the riparian owner is distinctly recognized as a right given by statute, but this right cannot be acquired by trespass, and if it cannot be exercised on the State lands or public lands the right to go upon the lands of another must be acquired by condemnation or purchase. When the right to go upon these lands is thus acquired the right to exercise the statutory grant to appropriate and use the waters of the stream may then be exercised. If riparian rights were recognized a man could not by condemnation proceedings acquire the right to go upon another man's land and divert waters from the stream, to which waters the owner would be entitled as riparian proprietor.

Upon a close analysis of the discussion, it will be found that the doctrine of riparian rights is not recognized.

In that case the decision in the lower court was by Mr. Chief Justice Brantly, who then presided as trial Judge in that district.

In a later case, Bullerdick v. Hemsmyer, 32 Mont. 541, Mr. Chief Justice Brantly said: "The use of waters in the streams in this State is declared to be a public use.

(Constitution Art. 3, Sec. 15.) Such being the case, every citizen has the right to divert and use them so long as he does not infringe on the rights of some other citizen who has acquired a prior right by appropriation."

"Each citizen may divert and use them without let or hindrance, when no prior right prevents. When his necessary use ceases, he must restore them to the channel of the stream, whereupon they may be used by any other person who needs them."

The only right recognized by the Court is the right acquired by appropriation. The only claim upon which the right to use waters can be based is its application to a beneficial use.

The case of Campbell v. Flannery, 29 Mont. 246, cannot be construed as a recognition of riparian rights. In that case the defendant constructed a ditch and diverted all the waters of a certain stream to irrigate his lands. The plantiff filled up the bed of the stream and cultivated it with his other lands. Thereafter, the plaintiff turned the waters of the stream from his ditch and permitted them to flow in the old channel down to the plaintiff's land and thus overflow his lands. The action was brought to restrain the defendant from allowing the waters to flow down the natural channel of the stream and the only question presented to the Court was, whether or not the complaint stated facts sufficient to warrant the granting of an injunction. The Court held that the plaintiff did not show any right, which would entitle him to enjoin the defendant from permitting the waters to flow down the accustomed channel. This is not a recognition of riparian rights.

In the case of Ellinghouse v. Taylor, 15 Mont. 462, the

validity of the law giving the right to condemn the right of way over lands for ditches and reservoirs was before the Court for consideration. It was held that the law was constitutional and said: "The public policy of the territory and the State of Montana has always been to encourage in every way the development of the minerals contained in its mountains, and the necessity for adding to its tilled acreage is manifest. This state is an arid country, and water is essential to the proper tillage of its scattered agricultural valleys. With all this in view, it was expressly declared in our state's constitution that the use of water by private individuals for the purpose of irrigating their lands should be a public use. The statute of 1891 regulating the manner in which rights of way for irrigating ditches should be acquired was enacted under the constitution in order to carry out the intention of its framers and the people who adopted it."

The validity of the statutes declaring the use of water for a beneficial purpose to be a public use, and permitting the condemnation of right of way over the lands of others for the purpose of constructing ditches and reservoirs to enable the owner to apply the water to a beneficial use was recognized and upheld by the Supreme Court in the case of

Falbrook Irrigation District v. Bradley et al, 164 U. S., 112; and

Clark v. Nash, 198 U. S., 361.

It is unnecessary to cite the numerous cases that have been before the Supreme Court of Montana for consideration involving all questions relating to the right to use the waters of the streams of the territory and state, excepting the question of riparian proprietorship. That

question never was presented and has never been recognized.

Riparian rights as they existed at common law were not retained by the statute adopting in part the common law of England. The First Legislative Assembly of Montana enacted the following statute, approved January 11, 1865, erroneously stated in the Compilation of 1887 to be approved January 12, 1872.

Section 1. "That the common law of England so far as the same is applicable and of a general nature and not in conflict with the special enactments of this territory, shall be the law and the rule of decision and shall be considered as in full force until repealed by legislative authority."

The statutes heretofore quoted abrogated and repealed the common law doctrine as to riparian rights.

Even without the enactment of these laws, the common law doctrine of riparian rights would not prevail, because the same are not applicable to the conditions existing in this arid country.

In the case of Atchison v. Peterson, 20 Wallace, 507, an appeal from the Supreme Court of the Territory of Montana, Mr. Justice Field said: "As respects the use of water for mining purposes, the doctrine of the common law declaratory of the rights of riparian owners, were at an early day after the discovery of gold, found to be inapplicable or applicable only in the very limited extent to the necessitities of miners and inadequate to their protection."

And in the case of Basey v. Gallagher, 20 Wallace, 670, which was another case from the Territory of Montana, Mr. Justice Field said: "In the late case of Atchison v.

Peterson, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it: that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages and regulations, had recognized the inherent justice of this principle and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the Legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on

the public lands for the purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." * * * *

"Several decisions of the Supreme Court of Montana have been cited to us recognizing the right by prior appropriation to water for purposes of mining on the public lands of the United States, and there is no solid reason for upholding the right when the water is thus used, which does not apply with the same force when the water is sought on those lands for any other equally beneficial purpose. In Thorp v. Freed, 1 Mont., 652, 665, the subject was very ably discussed by two of the justices of that court, who differed in opinion upon the question in that case, where both parties had acquired the title of the government. The disagreement would seem to have arisen in the application of the doctrine to a case where title had passed from the government and not in its application to a case where neither party had acquired that title. In the course of his opinion Mr. Justice Knowles stated that ever since the settlement of the Territory, it had been the custom of those who had settled themselves upon the public domain and devoted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same; that this right had been generally recognized by the people of the Territory, and had been universally conceded as a necessity of agricultural pursuits. "So universal," added the justice, "has been this usage that I do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this Territory, that has

not been irrigated by water diverted from some running stream."

"We are satisfied that the right claimed by the plaintiffs is one which, under the customs, laws and decisions of the courts of the Territory, and the Act of Congress, should be recognized and protected."

These decisions were made before the Act of 1877, heretofore cited, was passed by Congress. By that Act and Section 8 of the Act of 1903, generally called the "Reclamation Act", the right to appropriate waters was expressly given. The Supreme Court recognized the fact that the common law doctrine of riparian rights was not applicable to the conditions existing in Montana, and also held that under the customs, laws and decisions of the Courts of the Territory, that the right to appropriate water, as against riparian rights, existed.

These decisions have been recognized and accepted by the people of Montana as promulgating the rule regulating and establishing their rights to the use of the waters in this State. Acting under the belief that that rule established property rights they have invested millions of dollars in reclaiming and improving lands.

That the common law rule is not applicable to the arid states in the West, was recognized by the Supreme Court in

Clark v. Nash, 198 U. S., 361,

in which Mr. Justice Peckham said: "The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western states by their constitutions and laws, because of the totally differ-

ent circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby constributing to the growth and prosperity of those states, arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated."

The present law in force in this State, relating to the adoption of the common law, is as follows: "In this State there is no common law in any case where the law is declared by the code or the statutes; but where not so declared, if the same is applicable and of a general nature and not in conflict with the codes or other statutes, the common law shall be the law and rule of decision."

(Code of Civil Procedure, Sec. 3452. Codes of 1895.)

There are other provisions in the Code providing that the common law rule of strict construction shall not be adopted, and that the codes so far as they are the same as the common law must be construed as a continuance thereof.

(Section 5152, Political Code.)

(Sections 4652-4653, Civil Code.)

(Sections 3453-3454, Code of Civil Procedure.)

The decision in the case of Cruse v. McCaully, 96 Fed., 369, is not applicable to the facts in this case. While we have a very high opinion of the learning and ability of Judge Knowles, his opinion cannot be held as a construction of the laws of Montana.

The Court said: "It must be conceded that the United

States, as the properietor of the land over which the South Fork of McDonald creek flowed, had a right to the flow of the waters thereof over its land, as an incident thereto. In the eastern part of Montana, the United States acquired its title to lands by virtue of what is called the "Louisiana Purchase." There cannot be one rule as to the right to the flow of water over its lands in Montana, and another rule as to its lands in Iowa and Missouri. In these last-named states there can be no doubt of the rule that the national government would be entitled to water which is an incident to its land."

The learned Judge overlooked the rule of the Supreme Court of the United States established by a long line of decisions, that the riparian rights of individuals, or of the Government as the owner of land must be determined by the laws of the State where the land is situated.

Mayor & Council of the City of Hoboken vs. Pa. R. R. Co., 124 U. S. 656;

St. Anthony Falls Water Power Co. vs. St. Paul Water Comrs., 168 U. S. 349;

Barney vs. Keokuk, 94 U. S. 324;

St. Louis vs. Myers, 113 U. S. 566;

Packer vs. Bird, 137 U. S. 661;

Hardin vs. Jordan, 140 U. S. 371;

St. Louis vs. Rutz, 138 U. S. 226;

Kaukauna Water Power Co. vs. Green Bay & M. C. Co., 142 U. S. 254;

Shivelv vs. Bowlby, 152 U. S. 1.

It is immaterial what the rights of an individual or the Government as riparian proprietors, may be in any other State; such rights in the State of Montana must be determined solely by the laws of this State.

The case of

Sturr vs. Beck, 133 U. S. 541,

cited in the Circuit Court of Appeals as an authority in support of riparian rights was an appeal from the Supreme Court of the Territory of Dakota, in which the doctrine of riparian rights was clearly recognized by statute quoted in the opinion in that case, as follows: "The owner of land owns water standing thereon or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue or pollute the same." Levisee's Dakota Codes, 2d ed., sec. 255, Civil Code.

The rights of the parties in that suit accrued in 1879 and 1880 respectively. The first law passed in the Territory of Dakota giving the right to appropriate water for a beneficial use was passed in 1881.

An attempt was made in the Circuit Court of Appeals to draw distinction between the laws of Montana and the laws of Wyoming, Idaho and Colorado. There is practically no distinction between the laws of these States and the laws of Montana relating to the appropriation of water. The provisions of the statute of these States do not give any greater rights than is given by the laws of Montana to acquire by appropriation the rights to use waters of the rivers and streams of this State.

RIGHTS OF PARTIES UNDER DOCTRINE OF RIPARIAN RIGHTS.

But if it is held that riparian rights were or are recog-

nized in this State, either as such rights existed at common law or as extended by rule established by the earlier decisions of the Supreme Court of California, the judgment is wrong, because the defendants would be entitled to a reasonable use of the waters for the purpose of irrigating their riparian lands. It is alleged in the answer (Trans. page 16,), "that all of the said lands (the lands owned by the defendants) are situated within the water-shed of said Milk river and its tributaries, and all said lands are arid, agricultural lands, and for the purpose of reclaiming the said lands and making the same inhabitable and capable of growing crops thereon, it is necessary that said lands be irrigated by artificial means and without such irrigation the said lands cannot be reclaimed, would not be inhabitable and crops could not be nuccessfully cultivated and grown thereon."

And it is further alleged (Trans. pages 17-18), "and the only source of supply for waters to irrrigate said lands is from the said Milk river and its tributaries, and if these defendants are deprived of the use of said waters, their lands cannot be successfully cultivated and crops cannot be successfully grown thereon, and they will become useless and homes cannot be maintained thereon."

For the purpose of this case these allegations must be taken as true. The defendants have alleged the necessity for the use of water for irrigation purposes to produce crops on their lands and make them inhabitable. If the doctrine of riparian rights prevails, the rights of these defendants as riparian proprietors must be recognized, and it was error for the Court to enjoin them from using the waters of Milk river and its tributaries.

Evidence should have been taken and the respective

rights of the parties to a reasonable use of the waters determined. Under the strict common law rule riparian proprietors are entitled to a reasonable use of the waters for agricultural purposes. In England the rule is thus stated in the case of

Earl of Sandwich v. G. N. Railway Company,
10 Chancery Division 707,

"That is the use which a riparian proprietor may reasonably make; he may take the water for irrigation. He may take it, no doubt, notwithstanding what Mr. Hemming said, for any purpose of his manufactory, whether he is a founder, dyer, or anything else. He may take all that is reasonable for the purpose of his business, provided, only that he does not take so much as injures the other persons whose rights are equal to his own, which injury he can prevent by returning a reasonable quantity to the stream."

"The cases that have been referred to do not in the least justify the plaintiff's complaint. The law in the case of Embey vs. Owen (6 Ex. 353) is laid down in a most elaborate manner by Lord Wensleydale. The law is laid down by Lord Kingsdown in Minor v. Gilmour, (12 Mores P. C., 156) in the privy council in very much shorter terms with a conciseness and felicitousness of expression which all Judges may reasonably envy, but both cases are to the effect, that, a riparian proprietor has a right to make all the use he can—to derive every benefit he can—from the stream, provided, he does not abstract so much as prevents other people from having equal enjoyment with himself."

The law as recognized in this country is thus expressed in an early decision in Massachusetts,

Weston v. Alden, 8 Mass., 136.

In that case, the defendant cut several sluices in the bank of the stream and permitted the water to pass through them to irrigate his meadows; much of the water was absorbed and evaporated, and by reason thereof less water than usual reached the plaintiff's land. The Court said: "We think, upon the facts reported in this case, that the plaintiff has no right of action and the verdict must be set aside. A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating the close; and he may do this either by dipping the water from the brook and pouring it upon his land, or by making small sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absequeinjuria.*"

In Elliot v. Fitchburg Railroad Co., 10 Cush. 191, Mr. Chief Justice Shaw said: "The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing

purposes would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor, whereas taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who used it for domestic supply or watering cattle, and therefore it would be an unreasonable use of the water; and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent, a question of degree; still the rule is the same—that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use and for manufacturing and agricultural purposes. * * *

"That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably. * * *"

"This rule that no riparian proprietor can wholly abstract or divert a water course, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quantity of his property, deemed, in law, incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound

so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors."

The rule above stated is somewhat modified or rather enlarged and extended by the early decisions of the Supreme Court of California and in other States where irrigation is practiced to any extent and the doctrine of riparian rights is in any way recognized. In

Lux v. Haggin, 10 Pac. 674,

the Court said: "But even if the defendant is treated as a riparian proprietor with reference to the specific tract in which is the head of its canal, we entertain no doubt, upon principles of the common law as applied to the conditions here existing, that each riparian proprietor is entitled to a reasonable use of the water for irrigation. This statement has its bearing on the alleged public policy which, it is claimed, should control when the alternative is presented between "appropriation" and the non-use for irrigation, or like purposes, by any person. What is a reasonable use by a riparian occupant—reference being had to the use required by the others—must depend upon the circumtsances of each particular case."

In Charnock v. Higuerra, 44 Pac. 171, the Supreme Court of California said: "No rules have ever been laid down by this court for determining the relative and proportional rights of riparian proprietors to the use of water for irrigation, nor has any case come before us in which we could properly determine what are the rules on that subject. But, whatever difficulties may arise in matters of detail, that problem must find its solution in an application of the principles upon which the right

to use water for that purpose at all is based. That right, as recognized in the decisions of this court, is founded upon the proposition that in an arid country the use of water for irrigation is of such vital consequence that, of necessity, it must be considered as embraced within the spirit of the category of rights accorded by the common law to riparian proprietors. The common-law rule, as interpreted in this country, is that the right to the waters of the stream, with certain exceptions, not material here, belongs to the riparian proprietors in common and equally and may be exercised by each as the necessities of the situation may require, only so as not to infringe upon the equal rights of the others. As irrigation is here a necessity of the situation, resulting from climatic conditions, the right to use a just and equal portion of the water for that purpose has been held to be an essential part of the riparian ownership."

In

Ulbricht v. Eufaula Water Co., 6 Southern, 78,

the Supreme Court of Alabama said: "The general rule is often stated to be that every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality. But this rule is qualified by the limitation, now well recognized, that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes; or, to state the rule in the words of Shaw, C. J., in

Cary v. Daniels, 8 Metc. 477:

"Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the pro-

gress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below."

Harris vs. Harrison, 93 Cal. 626.

Bathgate vs. Irvin, 29 Pac. 325, Cal.

Wiggins vs. Municipal L. & W. Co., 45 Pac. 160 Cal.

Messengers Appeal, 109 Penn. St. 285.

The right to a reasonable use of the waters of a stream for irrigation purposes by riparian owners is thus recognized in all countries and it is recognized to a larger extent in the arid countries than where there is greater rainfall and less is required for agricultural purposes.

Under the rule thus shown, the defendants would be entitled to a reasonable use of the water for domestic and agricultural purposes, and evidence should have been taken on that subject.

In discussing this feature of riparian rights, we do not want to be understood as receding from the position we have taken in this case, that the common law doctrine of riparian rights does not exist and was never recognized in Montana, and that the rights of the parties must be determined according to the dates of their respective appropriations.

RIGHTS OF PARTIES AS APPROPRIATORS.

The right to the use of the waters of the rivers and streams of this State may be acquired by appropriation.

This right is given by the laws of the Territory and State heretofore quoted. The right was recognized by the rules and customs established by the people from the earliest settlement of the Territory. The right was recognized and enforced by the Courts of the Territory,

and State since the establishment of those Courts. The right is recognized by the Act of Congress, approved July 26, 1866. (Rev. Statutes, Sec. 2339.)

The right was again recognized and expressly given by the Act approved March 3, 1877, and amended in 1891, as follows: "That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre, to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter; Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The Act of Congress approved May 3, 1888, ratifying the agreement with the Indians and declaring all the lands, excepting those mentioned as reservations to be a part of the public domain and open to settlement under the homestead and desert land laws of the United States,

made these lands subject to settlement under said laws and the waters thereon subject to appropriation under the customs and rules established in Montana, the decisions of its Courts, the laws of its Legislature and the laws of Congress.

The Government thereby granted to these appellants and others who wished to avail themselves of the privilege, the right to settle upon these lands and reclaim them, and to divert and appropriate water from the rivers and streams situated on said public domain. To reclaim these lands it was necessary to divert and appropriate waters. It was one of the conditions precedent under which the title could be obtained under the desert land act that the applicants to reclaim the lands should appropriate water for the purpose of so doing and show that they had reclaimed the lands, appropriated the water and the source from which they appropriated it.

There is no source, other than the Milk river and its tributaries, from which water can be obtained to reclaim and irrigate these lands. This is alleged in the answer and for the purpose of this case must be taken as true. This Court will take judicial notice of the geography of the country, which shows that these lands are within the water shed of Milk river and its tributaries, and that there is no other source from which water can be obtained to irrigate them. These appellants have shown in their answer that they and their predecessors in interest at all times mentioned in the bill of complaint, were citizens of the United States, qualified to make entry upon the public lands and that they respectively did enter upon and acquire title to a large amount of lands opened for settlement under the Act of

Congress, approved May 1st, 1888. (A map showing the lands and territory in controversy is attached to this brief.) That, for the purpose of diverting water to reclaim these lands they constructed dams in the channels of Milk river and its tributaries and did thereby divert the waters of said streams and by means of canals and ditches constructed by them, conveyed the water to, over and upon their lands and applied the same to a beneficial use. That the amount of waters thus appropriated exceeds 5,000 miners' inches, or one hundred and twenty-five cubic feet per second. That they duly executed, posted and filed all the necessary notices of appropriation required by the laws of the State of Montana and the rules, and decisions of its Courts, and the custom of the country and performed all necessary acts within the time required to make a valid appropriation of the waters. These notices though fully pleaded are not set out in full in the pleadings, for the reason that under the statutes of Montana, as construed by the Supreme Court, a valid appropriation may be made by diverting the waters and applying them to a beneficial use.

Murray vs. Tingley, 20 Mont., 260.
DeNecochea vs. Curtis, 22 Pac., 199.
Wells vs. Mantes, 34 Pac., 325.

That the waters of said Milk river and its tributaries are necessary and indispensable to the appellants in irrigating and cultivating their lands and maintaining their homes thereon, and are of great value to them, to-wit: A value of more than $100,000; and if the claim of the appellee and the Indians is sustained the appellants will be deprived thereof, their lands will be ruined and it

will be necessary to abandon their homes and they will be greatly and irreparably damaged, the extent and amount of which cannot now be estimated, but will greatly exceed $100,000, and they will be wholly without remedy. (Trans. p. 19.)

It is further alleged in the answer and must be taken as true, that others have settled upon lands within the water shed of the Milk river and its tributaries, and from these waters irrigate and cultivate the same and aided the appellants in establishing a civilized community in that country, in building, and maintaining churches, schools, villages and other elements and accompaniments of civilization, and who are dependent upon the successful reclamation and cultivation of said lands, and that if the claim of the appellee to the waters of said Milk river is maintained, all said lands will be rendered valueless, said communities broken up and destroyed and the purpose and object of the Government in opening said lands for settlement will be wholly defeated. (Trans. p. 18.)

The right to settle upon and acquire title to these lands is in the nature of a grant from the Government; the right to appropriate the waters on the public domain, given by the laws of Congress and the laws of the State of Montana, is likewise in the nature of a grant.

It was contended in the Court below that a grant from the Government should be construed strongly in favor of the grantor.

This rule applies only in cases where there is any ambiguity in the grant. In this case there is no uncertainty or ambiguity. The Indians relinquished all their right, title, claim and interest in and to the lands that were opened for settlement, reserving to themselves only

the lands mentioned and described as Reservations. The land relinquished by them was declared to be a part of the public domain, and open to settlement under the homestead and desert land acts. To acquire land under the desert land act to make the land productive and habitable, it is necessary to appropriate waters for the purpose of irrigation. There is no source from which such water could or can be obtained excepting from Milk river and its tributaries. Without the use of those waters the land thrown open to settlement would be practically worthless and a civilized community could not be established or maintained thereon.

When the land was declared to be a part of the public domain it immediately became subject to the laws of Congress and the laws, rules and decisions of Montana, in relation to the appropriation of water to the same extent as if those laws, rules and decisions were embodied in the Act. When the land thus became subject to those laws, rules and decisions there was not any ambiguity or uncertainty about the meaning of the grant or the rights of persons settling upon those lands to appropriate the waters of the streams flowing thereon or adjacent thereto.

It is the settled rule of law in Montana and other arid States that the right to the use of water may be acquired by valid appropriation and its application to a beneficial use. It is also held that such rights are superior to the rights of a riparian owner.

Atchison vs. Peterson, 20 Wall. 507.
Basey vs. Gallagher, Id. 670.
Clark vs. Nash, 198 U. S. 361.
Clough vs. Wing, (Ariz.) 17 Pac. 453.
Austin vs. Chandler, (Ariz.) 42 Id., 483.

Reno S. M. & R. W. vs. Stevenson (Nev.) 20 Nev. 274, 21 Pac., 317.

Stowell vs. Johnson, 7 Utah, 215; 26 Pac., 290.

Moyer vs. Preston, 6 Wyo., 308; 44 Pac., 845.

Drake vs. Earhart, 2 Ida., 722; 23 Pac., 541.

Krail vs. United States, 79 Fed., 243; 48 U. S. App. 711; 24 C. C. A. 543.

Speake vs. Hamilton (Ore.) 21 Or., 7; 26 Pac., 856.

Isaacs vs. Barer, 10 Wash., 130; 38 Pac.., 871.

Union Mill & Min. Co. vs. Ferris, 2 Sawy. 176; Fed. Cases, No. 14, 371.

Union Mill & M. Co. v. Danberg, 81 Fed., 73.

These laws, decisions and customs of the country have been recognized by the laws of the United States. The right to appropriate water on public lands was recognized by Congress in 1866.

Comp. Stat. Sec. 2339, 2340.

It is again expressly recognized by the Act of March 3, 1877, as amended by the Act of March 3, 1891.

Comp. Stat. p. 1548, 1549.

Broder vs. Natoma M. & M. Co., 101 U. S. 274.

U. S. vs. Rio Grande D. & I. Co., 174 U. S. 690.

Gutierres vs. Albequerque, et. Co., 188 U. S. 545.

Smith vs. Deniff, 24 Mont., 20.

In Denver vs. Rio Grande D. & I. Co., supra, Mr. Justice Brewer made two limitations upon the exercise of this power by the State. First, the reservation on the part of the United States of the waters necessary for the beneficial use of government property. Second, the reservation on the part of the United States of the control of the navigable streams within the limits of the United

States. Neither of these limitations affect the case at bar, except to the extent perhaps, of entitling the Government to the use of waters for domestic purposes at the agency buildings, diverted and appropriated for that purpose. The reservation of the necessary water on the part of the United States for the beneficial use of Government property cannot be construed to mean that that water is reserved to irrigate Government lands. The lands open for settlement and declared to be a part of the public domain are the property of the Government in the same sense as is the land set apart for occupation by the Indians. It cannot be contended that the Government reserved the water for beneficial use on its lands, whether these lands were thrown open for settlement or set apart for the use of the Indians. The irrigation of Indian lands is not a governmental function.

The reservation or use of water for Government property was not before the Court for consideration in the case cited. It did not define the class of government property to which the exception would apply and the expression of the Court on the subject may be regarded as *obiter dictum*.

The laws under which most of the defendants have acquired their titles to the lands owned by them recognize the doctrine of appropriation under the state laws. The Act of March 3, 1877, as amended in 1891, (19 Stat. 377, 26 Stat. 1096) provides that the right to the use of water by the person so conducting the same upon the desert lands shall depend upon bona fide prior appropriation, and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and

not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights. And by the Act of 1877, this Act was made specifically applicable to the then territory and now State of Montana.

It is claimed that this right of appropriation is subject to existing rights.

We have shown in this brief that riparian rights and the right to the use of waters of a stream must be determined according to the laws of the state in which the stream is situated.

We have also shown that the Government as the owner of lands stands in the same attitude as a private owner and its property is subject to the laws of the State, and that its land situated on a non-navigable stream, it is in the same position as a private owner subject to the general laws of the State.

Hardin v. Shed, 190 U. S., 508.

If a person is not and at the date of the ratification of the agreement with the Indians was not entitled to riparian rights in Montana, the Government is not and was not entitled to such rights. We have shown that such riparian rights never prevailed in Montana. The ratification of the agreement with the Indians, setting aside certain lands for a reservation, and the law declaring the rest of the lands a part of the public domain and open for settlement, were a part of the same Act. The legal rights of the Government and the rights of the persons who would thereafter settle upon those public lands became fixed by the terms of that Act.

There were no existing rights in favor of the Government as against the settlers. The settler settling upon

lands bordering upon the Milk river or its tributaries, could not claim the waters thereof, unless he diverted them and applied them to a beneficial use. The Government of the United States or the Indians likewise could not claim the waters unless the same were diverted and applied to a beneficial use. The existing rights, if any, that the appropriation of the appellants were subject to were rights acquired by a valid appropriation of the waters and not any right under the doctrine of riparian ownership. The only right the Government has against these appellants is the right to two hundred and fifty inches of water diverted and appropriated from the stream prior to the appropriations made by these appellants.

Appellants are not claiming any waters by virtue of any appropriation made upon the Reservations, set apart and occupied by the Indians. Their appropriations were made upon lands, which were declared by Congress to be a part of the public domain. These lands, when declared to be a part of the public domain, became subject to all the provisions of the Acts of Congress and the laws of the State of Montana, relating to the appropriation of waters There is no distinction between the public domain in Montana and in other states. No greater right can be acquired upon these lands in one state than can be acquired in the other. All lands that are, or ever were a part of the public domain were, at one time, Indian Territory, and while the Indians had only the bare right of occupancy, and the absolute title was in the United States, yet they were all open to settlement by the Government of the United States, by first extinguishing whatever title the Indians had thereto, and such lands, leke the lands upon which these defendants settled,

became a part of the public domain.

The Government having the absolute title and right to dispose of all its lands including the lands within the Fort Belknap Indian Reseravtion, had authority to grant the right of appropriating water upon those lands and upon the reservation. No reservation or restriction having been made, the Government cannot now, after these defendants have accepted the grant, acquired vested rights and expended a large amount of money in improving their lands, enjoin them from using he waters which they have appropriated. If it was intended to prohibit the settlers upon the riparian lands of Milk river and its tributaries from diverting and appropriating water to reclaim the desert lands and to provide that the waters of Milk river should be permitted to flow undiminished in quantity past the Indian Reservation, it was useless to restrict the Indians to the reservation as now defined, because the balance of the land would be worthless without water. The Act of Congress throwing open to settlement the land purchased from the Indians would be an empty promise to the settler for the reason that the lands were not capable of being settled under the laws applicable to them without the use of the water.

It is alleged that the appellants did not obtain permission of the Indians or the Secretary of the Interior to appropriate and divert the water. The Government of the United States has given to its citizens the right to go upon the public domain and the right to appropriate and divert waters for beneficial purposes. This grant is given without modification or restriction. It is not necessary to obtain permission for any officer or person to appropriate and divert waters. No officer of any

Department of the Government has authority to suspend or modify the operation of that grant. While the land is the property of the Government the people have the right to go upon the land, appropriate and divert water thereon and apply it to a beneficial use.

It was contended in the Court below that the waters of Milk river, so far as the same are a part and portion of the Fort Belknap Indian Reservation and needed upon said reservation for domestic and agricultural purposes never were and never became public waters subject to appropriation by any person under the State or federal laws. This proposition may be true so far as it is applicable to the case of an appropriator who is required to go upon the reservation for the purpose of appropriating waters there flowing. But it can have no application to the lands and waters claimed by these appellants for the reason that the treaty expressly ceded and relinquished to the United States all of the right, title and interest of the Indians in and to these identical lands, and the Act accepting and ratifying the treaty threw these lands open to settlement as a part of the public domain, and all the laws applicable to the public domain became immediately applicable to the territory thus thrown open to settlement.

The Choctaw case heretofore cited, was a controversy wholly between the Government and the Indians as a tribe. The rights of individuals were not in any way concerned. If there should be a liberal rule of construction of the treaties with the Indians, extending or limiting the meaning of the plain language used in the treaty, it could have been applied in that case, without injury to any person. In the case at bar, the contro-

versy is between the Government and the Indians on one side, and the settlers on the other; settlers who, in good faith, accepted the grant of the Government, settled upon and reclaimed these lands, at a great expense, and established their homes and civilized communities in that country. The Courts should not construe that agreement by extending or limiting the meaning of the language used, to deprive these pioneer citizens of the fruits of their labor, destroy their homes and make their farms barren wastes.

The Indians individually or collectively have not any claim to the waters of Milk river that they can enforce against the Government or against the appellants. They relinquished all claims to the lands that were opened for settlement. The Indians are not the owners of the lands included within the Reservation. They are merely occupants of lands owned by the United States set apart for their occupancy. Their occupancy does not add to or take away from the title of the United States.

As early as 1823, Chief Justice Marshall, in the case of Johnson vs. McIntosh, 8 Wheaton, 543, said: "It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundaries described in the treaty (with Great Britain) subject only to the Indian right of occupancy, and that the exclusive power to distinguish that right was vested in that government which might constitutionally exercise it. * * * The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet any attempt of others to intrude into that country would be considered as an aggres-

sion which would justify war. The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was required. They maintain as all others have maintained that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.'

From that decision down to the present day there has been no modification of that rule. The Indians have merely the right to occupancy of the lands and the United States may dispose of the fee thereof as it sees fit.

United States vs. Kagama, 118 U. S. 379.

Raff vs. Burney, 168 U. S. 221.

Butz vs. Northern Pacific Railroad Co., 119 U. S. 66.

Spalding vs. Chandler, 160 U. S. 403.

Beacher vs. Witherbee, 95 U. S. 517.

United States vs. Cook, 19 Wallace, 591.

In Caldwell vs. Robinson, 59 Fed. 653, on page 654, Beatty, Judge, said:

"From the Mississippi River to the South Sea, the country was claimed by an aboslute title by the Governments of France and Spain. Their title passed to the United States by treaties with France in 1803, and with Spain in 1819. The only right ever conceded to the Indians was that of occupancy, which has generally proven to be the merest shadow of a right when it became inconvenient to the dominant race."

In United States vs. Alaska Packers' Ass'n, 79 Fed.,

152, on page 156, Judge Hanford said:

"The treaties made with the several Indian tribes are not to be regarded as conveyances of the title to lands in Washington Territory, from the Indians, as proprietors, with limitations and reservation of easements. The Government of the United States does not deraign title to its public lands from the Indians. The National Government is the primary source of title, and, as original proprietor, it has the power to dispose of public lands, even within an Indian Reservation, without the consent of the Indians."

The case of the Government is not made any stronger under the plea that it is prosecuting the action in behalf of the Indians. It cannot assert any claim in their behalf that it cannot assert in its own. It cannot restrict the terms of its grant under the plea that it is made in behalf of the Indians, or because of its contractual relations with them. It is seeking to restrict the terms of the grant to the people, given under the Act of May 1, 1888, and previous Acts heretofore cited, and to claim these waters for use upon its own lands reserved for occupancy by the Indians.

The question of the right of the Government to the use of waters upon a reservation as against the settlers upon the public lands was before the Circuit Court of Appeals, Ninth Circuit, in the case of

Krall vs. United States, 79 Fed., 241,

and Mr. Justice Ross said: "That doctrine of prior appropriation in respect to the waters upon the public lands was in full force when, according to the record in the case at bar, the plaintiff in error went upon the public lands and appropriated, for the purpose of irrigat-

ing his own land, a certain amount of the water of Cottonwood creek, there flowing. His appropriation was, of course, subject to the prior appropriation and use of the waters of the stream made by the government officials for the purposes of the military post reservation, which consisted of 640 acres of land, and was located on the stream in question below the point of the appellant's diversion. The military reservation was established by presidential proclamation in January, 1868,—subsequent not only to the time when the government, by its conduct in recognizing and encouraging the local custom of appropriating the waters of the non-navigable streams upon the public lands for agricultural and other useful purposes, had become bound to recognize and protect a right so acquired, but subsequent, also, to the passage of the act of congress of July 26, 1866, making statutory recognition of that right, and confirming the holder in its continued use. The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of the non-navigable streams upon the public lands. They continued subject to appropriation for any useful purpose. The appropriation of apart of those waters for the uses of the military post secured it in the use of the portion so appropriated, but it did not take from others the right to make such appropriation above the reservation as would not interfere with its prior appropriation."

It was contended in the Court below that there is a distinction between the laws of Montana and the laws of Idaho, and that the decision in the case of Krall vs. United States, is not applicable to the facts in this case.

There is no essential difference between the laws of Idaho and the laws of Montana, relating to the appropriation of water. There is no essential difference between the laws of Montana and the laws of all other states in which it is admitted that the doctrine of riparian rights does not exist.

They all give the right to acquire the use of water by appropriation. No State or Territory in express terms abolished riparian rights, excepting Arizona. Section 3198 of the Codes of that Territory provides, that, "The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory." California is the only State in which riparian rights were expressly retained. Section 1442, of the former Code of California, provided that, "The rights of riparian proprietors are not affected by the provisions of this title." That provision in the Codes of California was repealed by the Act of March 15, 1887, saving rights already vested. The decisions of California, recognizing riparian rights to an extent, in so far as we have examined them, relate to cases in which the right was acquired prior to 1887. We have been unable to find any decisions in California in which riparian rights were recognized when the claim was acquired after the passage of that Act.

It was also contended that Montana could have taken possession and assumed ownership of all waters in the State, but it is claimed that it did not do so. The Act of Congress admitting Montana to the Union on the same footing as the original states gave it jurisdiction and control over all the waters in the State. It would have the right to control and dispose of the waters without any declaration on its part that it assumed ownership and

possession thereof.

But, the Territory and the State did assume ownership of the waters by declaring by legislative acts that the use of any unappropriated water may be acquired by appropriation, and that when the appropriator ceased to use it for a beneficial purpose, the right of such use ceased.

The State has thereby assumed jurisdiction and control over all the waters in the State and prescribed the manner in which the right to the use of the waters may be acquired and how that right may be forfeited or lost.

Under these laws the appellants have made valid appropriations of water as alleged in their answer.

The appellee has not made any appropriation that is good against them except for two hundred and fifty inches for use at the Agency buildings.

CONCLUSIONS.

Under the pleadings in this case the issues presented are the respective rights of the appellants and the appellee to the use of the waters of Milk river and its tributaries, under the appropriations set forth in the bill of complaint and the answer. Their rights to the use of these waters must be determined according to the laws, customs, rules and decisions prevailing in the State of Montana and the Acts of Congress, granting the right to appropriate waters on the public domain.

The construction of the agreement with the Indians and the Act of Congress approving that agreement and opening the other lands for settlement arises incidentally, presenting the question whether or not that Act modifies the former laws of Congress on the subject of public lands and appropriation of water thereon, and whether or not

it overrides and annuls the laws and customs of the State on the question of the appropriation of water. The Circuit Court in granting the temporary and permanent restraining orders and the Circuit Court of Appeals in affirming such orders considered only the question of the construction of the agreement with the Indians.

We have discussed all questions bearing upon the issues involved as presented by the pleadings and the construction of the agreement with the Indians and the Act of May 1, 1888, to show that under no theory of the case should the injunction have been granted for the reasons:

1. That in the agreement with the Indians and the Act of Congress, ratifying that agreement, there was no reservation of the waters of Milk river or its tributaries for use on the Fort Belknap Indian Reservation.

2. There was no restriction of the rights of the appellants and other settlers to appropriate waters on that part of the public domain that was opened for settlement by the Act of Congress, approved March 1, 1888.

3. That the appellants made valid appropriations of the waters of Milk river and its tributaries under the laws, customs and decisions of Montana, and the laws of Congress, and their rights as grantees of the Government are superior to any rights which the Indians may have by reason of the agreement entered into between them and the Government.

4. That the doctrine of riparian rights is not recognized, does not prevail and never was in force in Montana, and the rights of the parties to the use of the waters of Milk river and its tributaries must be construed according to the laws of this State.

5. That even if the doctrine of riparian rights did

prevail, the appellants would be entitled to a reasonable use of the water for the purpose of irrigating their lands, having in view the equitable rights of others.

6. That the right to appropriate water is recognized by the laws of the United States, the laws and decisions of the Courts and the customs prevailing in Montana, which are now and were in force in Montana at the time the agreement was made with the Indians, and these appellants have shown that they acquired title to their lands under the grant from the Government and made valid appropriations of the waters to reclaim them, which appropriations are prior and paramount to any appropriation made by the appellee, excepting to the amount of two hundred and fifty inches, which for the purpose of this case is conceded to be a valid appropriation made in accordance with the laws of Montana and prior to the appropriation made by these appellants.

Respectfully submitted,

EDWARD C. DAY,

JAMES A WALSH,

Solicitors for Appellants.

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FOR

FILMING

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

HENRY WINTERS, JOHN W. ACKER, Chris Cruse, Agnes Downs, et al., appellants,
v.
THE UNITED STATES.
No. 158.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming a final decree of the Circuit Court of the United States for the district of Montana, which made perpetual an injunction *pendente lite* theretofore granted against appellants and others, defendants below, restraining them and each of them "from using or in any manner interfering with the use by the Government of the United States or the Indians upon the Fort Belknap Indian Reservation of 5,000 inches of the waters of Milk River and its tributaries in the district of Montana." (Rec., p. 31.)

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The decree of the Circuit Court and the decision of affirmance by the Circuit Court of Appeals were based entirely upon the force and effect of an agreement, dated December 28, 1886, between the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana and the United States, which was ratified and confirmed by act of May 1, 1888 (25 Stat., 113–133).

The bill of complaint was filed June 26, 1905, against 21 defendants, 19 of whom appear to have been served with the writ of subpœna. (Rec., pp. 1, 10, 11.) Thereafter, under a rule secured by complainant to show cause why a preliminary injunction should not be granted, and after a hearing upon affidavits, an order was secured by complainant enjoining the 19 defendants so served, 14 of whom are appellants here (Rec., p. 38), "from interfering in any manner with the use of 5,000 inches of the waters of Milk River in the State of Montana." (143 Fed. Rep., 740–741.)

This order was affirmed by the Circuit Court of Appeals (ib., pp. 740, 749).

On March 5, 1906, the joint and several answer of 14 of the defendants was filed (Rec., pp. 11, 19), and thereafter an order for a decree *pro confesso* was entered against 5 of the defendants who had been served with the writ of subpœna and who had failed to appear (Rec., p. 20).

A final decree was entered on April 21, 1906, against the nineteen defendants who had been served

with notice of suit, whereby the injunction *pendente lite* theretofore granted was made perpetual (Rec., p. 21), the defendants so served being enjoined from interfering with the use and enjoyment of five thousand inches of the waters of Milk River by the complainant or by the Indians residing on the Fort Belknap Indian Reservation "for culinary, domestic, and irrigating purposes" (Rec., pp. 20, 22).

The fourteen defendants who had appeared and answered thereupon took an appeal to the Circuit Court of Appeals (Rec., pp. 22–26).

There was no summons in severance, however, as to the five defendants who had not answered but against whom the decree *pro confesso* had been entered.

The decree of the circuit court was affirmed by the Circuit Court of Appeals (Rec., pp. 31, 32, 33), and appellants brought the case to this court.

In their petition for appeal it was stated, among other things, "that the matter in controversy in said suit exceeds one thousand dollars, besides costs." With the petition for appeal appellants also filed assignments of error (Rec., pp. 34, 35).

The material facts, as the same are alleged in the bill of complaint, summarized, are, in substance, as follows:

1. That three of the defendants are corporations organized and existing under the laws of the State of Montana, and doing business therein (Rec., p. 2).

2. That on May 1, 1888, the lands within the Fort

Belknap Indian Reservation, the northern boundary of which is the middle of the channel of the Milk River, which river is a non-navigable stream, were set apart and reserved "as and for the permanent home and abiding place of the Gros Ventre and Assinniboine bands or tribes of Indians" in Montana, which lands have ever since and are now occupied and inhabited by them (Rec., pp. 2, 3). That on no part of said reservation can "crops of grain, grass and vegetables" be cultivated and raised, except by irrigation (Rec., p. 3).

That the Indian agent residing upon the reservation and other officers of the United States, together with the Indians, depend entirely upon the waters of said river "for domestic, culinary, and irrigating purposes." That during the year 1889 there was diverted from the channel of said river by complainant 1,000 miner's inches of water to be used for domestic, culinary, and irrigation purposes. That on July 5, 1898, complainant for the benefit of said Indians appropriated and diverted 10,000 miner's inches of the waters of said stream, which was thereafter used to irrigate 30,000 acres of the land within said reservation (Rec., p. 4). That upon these lands there has since been raised by means of irrigation "crops of grain, grass, and vegetables," whereby complainant "has been enabled * * * to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement" (Rec., p. 5).

That in order to enable complainant and the Indians successfully and properly to pasture and feed their horses and cattle, which are upon the reservation, "it is necessary and essential that the waters of said Milk River should be permitted to flow down the channel * * * to supply and furnish said stock with drinking water." (Rec., p. 5.) That all the waters of said river theretofore appropriated, diverted, and used are essential and necessary for the use of complainant "at the agency of said * * * reservation for household, domestic, and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken, and diverted." (Rec., pp. 5, 6.)

3. That during the year 1900 the defendants, without the consent of the complainant, or of the Indians, or of the Secretary of the Interior, at points above the point of diversion by complainant and the Indians, diverted and have ever since used upon land outside of the reservation all the waters theretofore running down the channel of said river, thereby depriving the complainant and said Indians of the use of the waters theretofore appropriated, diverted, and used by them. (Rec., pp. 6, 7.)

The eighth paragraph of the bill is as follows:

> And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated, and diverted from the

channel of said Milk river as aforesaid are essential and necessary for the use of your orator at the agency on said Fort Belknap Indian Reservation for household, domestic, and culinary purposes and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken, and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said bands and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive for the raising thereon of crops of grain, grass, and vegetables, large quantities of water flowing in said Milk river will be required and necessary for the purpose of irrigation of the said lands within said reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians, and to encourage

> habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stock raising as aforesaid, it is essential and necessary that all of the waters of said Milk river should be permitted to flow down the channel of said river uninterruptedly and undiminished in quantity and undeteriorated in quality.

By the ninth paragraph of the bill (Rec., pp. 6, 7) it appears that the relief prayed for in the eleventh paragraph was based upon—

1. The common-law doctrine of riparian rights; and

2. The stipulations contained in the agreement of December 28, 1886, which created and set aside the lands within the Fort Belknap Indian Reservation, and which was ratified and confirmed by the act of May 1, 1888 (25 Stat., 113–133).

The judge of the Circuit Court who heard the application for and subsequently granted the preliminary restraining order filed a memorandum of his views (see Appendix), from which it appears that he based his action in the premises solely upon the force and effect of certain provisions contained in said agreement. He found, as a fact, that the reasonable needs of the Indians on said reservation required the use of 5,000 miner's inches of the waters of Milk River.

The facts as found by the Circuit Court of Appeals when the case was first appealed (143 Fed. Rep., 740–742) from the record then before it, which consisted

of the bill of complaint and affidavits, are substantially as follows:

That said reservation contains about 1,000,000 acres, the greater portion of which is grazing land. That "approximately about 30,000 acres are susceptible of irrigation with the waters of Milk River," and that it "is the only source of supply" for the various uses of the Government and the Indians at the agency and for irrigation purposes generally on the reservation. That about 5,000 acres of land within the reservation are being irrigated from the waters of said river, which are carried to said lands by means of a ditch of a carrying capacity of 5,000 inches, and that "such amount of water is required for the present needs and requirements of the Government and the Indians, for household, domestic, agricultural, and irrigating purposes on said reserve." That "the stock ranging and feeding in the northern portion of the reserve * * * must depend principally upon Milk River for drinking water." "At the time of the institution of this suit no water reached any part of the reservation, the same having been diverted by the appellants." That the appellants diverted the waters as charged in the bill and used the same to irrigate lands acquired by the individual defendants "under the desert land laws of the United States." That appellants had expended over one hundred thousand dollars "in diverting the waters and in making other improvements on their lands." That "the acquisition of their lands

under the desert land laws, and appropriations of water, were made during the years 1895, 1900, and 1903." That crops can not be raised upon said lands, nor upon any of the lands within the reservation "without sufficient water to irrigate the same;" and "unless water is obtained, the lands and homes of the respective parties will be rendered valueless and useless." There was no finding in respect to the question, which party—complainant (appellee) or defendants (appellants)—had first actually appropriated by diversion and used the 5,000 inches of the waters involved.

The answer which was subsequently filed in the Circuit Court admits that during the year 1889 complainant, for the benefit of the Indians, appropriated, diverted, and used 100 miner's inches of the waters of said river, and in 1893 and 1894 appropriated and diverted therefrom 150 inches more, and on or about July 5, 1898, diverted 5,000 inches additional, and that such waters since the dates of their respective appropriations and diversions have been used on the reservation by complainant and the Indians for domestic, household, and irrigation purposes (Rec., p. 12).

It is alleged, however, in the answer, in effect, that prior to July 1, 1898, the answering defendants appropriated 120 second-feet of the waters of Milk River, or more than 5,000 miner's inches, and thereafter used the same "in irrigating their said lands and producing hay, grain and other crops thereon, and

for household and other domestic purposes" (Rec., p. 17). It is further alleged that there are other streams flowing through said reservation, viz: People's Creek, which flows about 1,000 inches; Big Warm Creek, flowing about 1,000 inches; Lodge Pole Creek, flowing about 600, and Clear Creek, flowing about 300 inches of water (Rec., p. 18).

In and by the answer defendants claimed that under the laws of Montana and of the United States they had a prior and superior right to all the waters of said river, except 250 miner's inches, which they conceded that complainant, by reason of prior appropriation and use, was entitled to. They alleged, however, that 250 inches had at all times flowed "down the channel of said Milk River to the plaintiffs' point of diversion" (Rec., pp. 18, 19).

Upon the second appeal the Court of Appeals, among other things, stated (Rec., p. 31; 148 Fed. Rep., 684, 685):

> The present appeal is taken from the final decree entered in said cause upon the bill and answer making the preliminary injunction perpetual. It is admitted that the answer sets forth the same facts that were presented in the affidavits on which the preliminary injunction was granted. We have carefully considered the record and we find that the questions here presented are precisely the questions which were discussed and determined upon the former appeal and that the record brings to our attention no new issues or questions.

In Montana, by statute, since March 3, 1889, forty miner's inches of water is the equivalent of one cubic foot per second of time. (Long on Irrigation, p. 394; Irrigation Institutions (Mead), p. 108.) One cubic foot per second in twenty-four hours will cover about two acres a foot deep, and in Montana is sufficient during the irrigation season to cultivate crops on from 50 to 60 acres. (Irrigation Institutions (Mead), pp. 120, 121.)

Montana became a State November 8, 1889 (26 Stats., 1551, 1552), one year and six months subsequent to the passage of the act which ratified and confirmed the agreement in question. No part of the waters here involved seems to have been diverted and used by either party until after the admission of Montana into the Union, nor was any attempt made by either party to divert and use it until after that time.

The lands claimed by the appellants, to cultivate which the waters in controversy were diverted by them, also the lands reserved and set aside by the agreement in question, were, prior to the date of said agreement, embraced within the Indian reservation created by the act of April 15, 1874. (18 Stat., 28, 29). The Fort Belknap Indian Reservation was, by said agreement, carved out of the reservation created by said act of April 15, 1874. The lands of the appellants having been, prior to May 1, 1888, embraced within an Indian reservation, were until that time burdened with the Indian right of occupancy, hence

not subject to sale or disposal under the general land laws, therefore not public lands until after the last-mentioned date. (*Newhall* v. *Sanger*, 92 U. S., 761, 763; *Leavenworth, etc., Railway Co.* v. *United States*, 92 U. S., 733, 741; *Missouri ,Kansas and Texas Railroad Co.* v. *Roberts*, 152 U. S., 114, 119; *Wisconsin* v. *Hitchcock*, 201 U. S., 202.)

As hereinbefore stated in effect, the theory of the bill of complaint is:

1. That the doctrine of riparian rights prevails in Montana.

2. That by act of Congress of May 1, 1888 (25 Stats., 113, 133), whereby was "accepted, ratified, and confirmed" the agreement with said Indians, they retained or were granted by the United States the right to divert and use for domestic, irrigation, and other beneficial purposes so much of the waters of Milk River as was sufficient to meet their needs and to carry out the objects and purposes sought to be effected by said agreement.

From the answer of the appellants it would appear that they base their claim to the use of the 5,000 inches of the said waters mainly upon the following propositions, viz:

1. That the doctrine in respect to the waters of natural streams which has always prevailed in Montana is that of appropriation and use for beneficial purposes, among which purposes is the irrigation of arid lands, and that under said doctrine the waters of flowing streams are not incident to the land, and

that priority in time of actual appropriation and use confers a prior and superior right to the use of the waters so appropriated.

2. That the parties to the agreement in question did not intend to reserve to the Indians the right to the use of any of the waters of Milk River for irrigation purposes.

3. That if such was the intention of the parties, as manifested by the language used, in this respect it is not of binding force as against persons who subsequent to its date, but prior to an actual appropriation by or for the benefit of the Indians, diverted and used the 5,000 inches in question for irrigation purposes. In other words, that priority in time of actual appropriation and use determines priority of right, irrespective of any reservation of said waters for the benefit of the Indians contained in the agreement.

ARGUMENT.

JURISDICTION.

Appellee contends that the appeal should be dismissed for the reason that of the nineteen defendants who were served with notice of the suit and against whom the decree complained of was entered, only fourteen appealed to the Circuit Court of Appeals and from that court here, and there was no summons and severance in either instance. (*Masterson* v. *Herndon*, 10 Wall., 416, 418; *Am. Loan & Trust Co.* v. *Clark*, 83 Fed. Rep., 230.)

THE MERITS.

In view of the fact that the lower courts have found in effect (which finding is not controverted by appellants) that 5,000 inches of the waters of Milk River are necessary to supply "the reasonable needs of the Indians" upon the reservation, the questions presented by the appeal and raised in the assignments of error are of law merely and may be stated as follows:

1. Whether the parties to the treaty or agreement in question intended to reserve to the Indians upon the reservation so set apart the right to the use of so much of the waters of Milk River as was reasonably necessary to irrigate their lands, which the lower courts have found to be 5,000 inches.

2. If so, whether said agreement in that respect is valid as against the appropriators of the waters of said river who diverted and used the same subsequent to the date of said agreement and the act of Congress ratifying and confirming the same and subsequent to the admission of Montana into the Union, but prior to the actual appropriation made by or for the benefit of the Indians.

In respect to the first question, it may be conceded that the agreement does not specifically reserve to the Indians any of the waters of Milk River. We contend, however, that the import of the language employed, when taken in connection with the objects to be secured and the purposes to be accomplished by the agreement, clearly evinces an intention by the

parties thereto to make a reservation of so much of said waters as should be found requisite to supply the reasonable needs of the Indians for domestic, stock, and irrigation purposes.

The main object of the agreement was to render the Indians "self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization" (preamble, 25 Stat., 113), and to this end to provide them with "permanent homes" (Art. I); to encourage habits of industry in them; to enable them to cultivate the soil "as a means of obtaining a livelihood" (Art. V), and to enable them to select allotments of 80 acres each, in severalty, upon which they had settled and made homes, and to secure complete titles to such allotments. (Art. VI.)

In view of the fact, acknowledged by all parties, that no part of the lands set apart by said agreement is susceptible of cultivation, except by the application thereto of the waters of natural streams, and the further fact, which is matter of common knowledge, that 80 acres of such land, in its natural condition, devoted to "pastoral pursuits" (Art. V), will not afford sufficient pasturage to sustain one head of live stock, it requires no argument to support the proposition that unless the right to the use of the waters of Milk River for domestic, stock, and irrigation purposes was reserved to the Indians, they could not be encouraged in the "habits of industry;" they could not obtain a "livelihood" by cultivating the soil; they could not secure "permanent homes;"

they could not become self-supporting, and allotments in severalty of 80 acres would be useless to them.

By the ratifying act the agreement became, in effect, a law of Congress, hence it should be interpreted to "carry into effect the object and purpose of" that body "as expressed in the language used." (*White* v. *United States*, 191 U. S., 545, 552.)

In construing the agreement it will be assumed that the parties to it, and Congress when it accepted, ratified, and confirmed the same, intended that it should reserve to the Indians everything that was essential to carry into effect its purposes. That Congress understood that the language of the agreement reserved water to cultivate the soil is manifest by the act of June 10, 1896 (29 Stat., 321), whereby was accepted, ratified, and confirmed another agreement with the Fort Belknap Indians, dated October 9, 1895 (Ib., 350–353), the second article of which (p. 351) expressly recognized that it was necessary to "enclose and irrigate their farms" in order to "best promote their civilization and improvement." See also acts of March 3, 1891 (26 Stat., 989, 1011); August 15, 1894 (28 Stat., 286, 305); March 2, 1895 (ib., 876, 900); June 10, 1896 (29 Stat., 321, 341); June 7, 1897 (30 Stat., 62, 85); and March 3, 1901 (31 Stat., 1058, 1075), whereby certain sums of money were appropriated "for the construction, purchase, and use of irrigation machinery on Indian reservations."

By the act of April 15, 1874 (18 Stat., 28, there was "set apart for the use and occupation" of

said Indians the following described lands "in the Territory of Montana," viz:

> Commencing at the northwest corner of the Territory of Dakota, being the intersection of the forty-ninth parallel of north latitude and the one hundred and fourth meridian of west longitude; thence south to the south bank of the Missouri River; thence up and along the south bank of said river to a point opposite the mouth of the Maria's River; thence along the main channel of the Maria's River to Birch Creek; thence up the main channel of Birch Creek to its source; thence west to the summit of the main chain of the Rocky Mountains; thence along the summit of the Rocky Mountains to the northern boundary of Montana; thence along said northern boundary to the place of beginning.

The reservation so created by said act embraced over 2,000,000 acres and included all the lands bordering on the Milk River and its tributaries within the United States. The agreement here in question carved out of said reservation about a million acres, and the remainder was ceded and relinquished to the United States, together with all the Indians' right, title, and interest in and to the same.

It can not be successfully questioned that under the act of April 15, 1874, *supra*, the Indians had the right to the use of the waters in the said river and its tributaries for any purpose. Their failure to exercise said right for irrigation purposes can not be held to be an abandonment of such right during the

time intervening between April 15, 1874, and the date of the agreement in question, for the reason that "so long as they maintained their tribal relations" they are "incapable * * * of being affected with *laches.*" (*Felix* v. *Patrick*, 145 U. S., 317, 332, 333.) Nor can it be presumed, in the absence of clear and explicit language to that effect, that the Indians would surrender the greater part of the lands they had occupied from April 15, 1874, to the date of the agreement, and at the same time surrender or agree to abandon the only means they had to raise crops on any of the lands they retained, and thus to defeat their desire and purpose to acquire permanent homes and gain a livelihood by the cultivation of the soil. (*Hatch* v. *Dwight*, 17 Mass., 288, 297.) So to presume and thus to construe the agreement as not reserving sufficient water to meet the reasonable needs of the Indians for all purposes, including the cultivation of the soil by irrigation, would not only defeat this main object, but would work a wrong and be prejudicial to them.

All agreements are to be construed, if possible, to effect their object and to carry out the intentions of the parties. (*Rood* v. *Johnson*, 26 Vt., 64.) An agreement between the Government and the Indians, however, is to be construed in favor of the latter, and never to their prejudice. (*Worcester* v. *State of Georgia*, 6 Pet., 515, 582; *Choctaw Nation* v. *United States*, 119 U. S., 1, 28; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 396; *United States* v. *Rickert*, 188 U. S.,

432, 443; *Matter of Heff*, 197 U. S., 488, 499; *United States* v. *Winans*, 198 U. S., 371, 380, 381; *Francis* v. *Francis et al.*, 99 N. W. Rep. 14; *Jones* v. *Meehan*, 175 U. S., 1, 11.)

Taking into consideration the object of the agreement and the purposes sought to be accomplished by it, the lands ceded and relinquished by the Indians, the right to the use of the waters of Milk River and its tributaries which they had enjoyed under the act of April 15, 1874, *supra*, and applying to the language employed in the agreement the principles applicable to all contracts alike, and considering such language in the light of the settled law of this court in respect to compacts with Indians, as seen in the decisions just cited, we respectfully submit that the parties to the agreement in question did intend to reserve to the Indians residing upon the reservation created thereby "the right to the use of so much of the waters of Milk River as was reasonably necessary to irrigate their lands," and hence that appellant's first assignment of error is not well taken.

IS SAID RESERVATION IN THE AGREEMENT VALID?

The next question presented for consideration and determination, and which is raised by the second, third, fourth, and fifth assignments of error, is whether, in the respect named, the agreement is valid as against actual appropriators and users of the waters involved, who diverted and used the same subsequent to the ratification of said agreement, and subsequent to the admission of Montana into the Union, but prior

to any actual appropriation by diversion, made by or for the benefit of the Indians.

We contend that the agreement in the respect named is valid and enforceable. This contention is based mainly upon the following propositions, viz:

1. That the modified doctrine, or what is commonly called the "California doctrine" of riparian rights prevailed in Montana at the date of said agreement, at the time the same was ratified by Congress and at the times appellants entered their lands and made their appropriations of waters to irrigate the same.

2. That under this doctrine the United States, as owner and proprietor of all the lands involved, could, prior to the date of the entries and appropriations made by appellants, by grant or otherwise, sever or segregate from said lands any or all of the waters of streams flowing by or through the same.

3. That the right of the Indians to the use of the waters in controversy is not governed or controlled by any local law, usage, or custom which prevailed in Montana while the same was a Territory, or which has prevailed there since it became a State, if by the enforcement of such laws, usages, or customs the Indians would be deprived of the use of the waters which were reserved in said agreement.

Before taking up the question in respect to the doctrine governing the waters of natural streams which prevailed in Montana at the times hereinbefore named, we desire to state that we concede that the strict

common-law doctrine of riparian rights does not, and never did, prevail in Montana nor in any part of the so-called arid region. It is pertinent, therefore, to inquire and determine what doctrines in respect to the waters of natural streams do prevail in said region, in what respect they differ from or resemble the strict common-law doctrines, and in what respect they differ from or resemble each other.

There are two doctrines or systems which so prevail, commonly known as the "California Doctrine" and as the "Colorado Doctrine." (See "Water Rights in the Western States" (Wiel), sec. 27, p. 68; Long on Irrigation, sec. 6.)

The "California Doctrine" is based upon and is a modification or enlargement of the common-law doctrine of riparian rights. (Wiel, *supra*, secs. 18, 27; Kinney on Irrigation, sec. 350; Long on Irrigation, secs. 6, 10.) It differs from the strict common-law doctrine in that it permits a reasonable use of the waters of natural streams to irrigate riparian lands. (*Lux* v. *Haggin*, Calif., 10 Pac. Rep., 674, 755; *Meng* v. *Coffey* (Nebr.), 93 N. W., 713, 718; *Crawford Co.* v. *Hathaway*, Nev., 93 N. W. Rep., 781, 790; *Willey* v. *Decker*, 73 Pac. Rep., 210, 214; *Clark* v. *Allaman* (Kan.), 80 Pac. Rep., 571, 584); "subject to the conditions of an equitable division between riparian proprietors." (*Kansas* v. *Colorado*, 206 U. S., 46.)

This doctrine is not susceptible of an exact definition, for the reason that what is a "reasonable use" depends upon the facts disclosed in each case as it

arises. (*Lux* v. *Haggin, supra,* 755.) And for the further reason that "riparian lands" have never been precisely defined. For the purposes of this case the following statement of said doctrine as found in *Willey* v. *Decker,* 73 Pac. Rep., 210, 214, 215, is appropriate, viz:

> Stated briefly, that doctrine is that while a stream is situated on the public lands of the United States a person may, under the customs and laws of a State and the legislation of Congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land, such right being good against all other private persons, and by statute good as against the United States and its subsequent grantees; but that when a grantee of the United States obtains title to a tract of the public land bordering on a stream, the waters of which have not been hitherto appropriated, his patent is not subject to any possible appropriation subsequently made by another party without his consent. In other words, it is held under that doctrine that the rules of prior appropriation, founded upon local customs and laws, and ratified by Congressional legislation, are confined in their operation to the public domain of the United States. (Black's Pomeroy on Water Rights, 44.) In Montana it seems one may make a valid appropriation of water with the same effect on unsold State lands. (*Smith* v. *Denniff,* 60 Pac., 398, 81 Am. St. Rep., 408.) It

is held in that State that the absolute title to a water right can only be acquired by grant, express or implied, of the riparian owner of the land and water, and the common-law rule that assured to a riparian owner the right to the reasonable use without substantial diminution in quantity and quality of the water flowing by or over his land is abrogated to the extent only that under the doctrine of prior appropriation a riparian owner, or one having title to a water right by grant from him, is allowed to use the water in a manner that at common law would be deemed unreasonable. (*Smith* v. *Denniff*, *supra*.) Upon that theory the right acquired by prior appropriation on the public domain is held to be founded in grant from the United States Government as owner of the land and water, under the acts of Congress of 1866. (Act July 26, 1866, c. 262, sec. 9, 14 Stat., 253. (U. S. Comp. St. 1901, p. 1437) and 1870 (Act July 9, 1870, c. 235, sec. 17, 16 Stat., 218 (U. S. Comp. St. 1901, p. 1437). Rev. Stat. U. S., secs. 2339, 2340 (U. S. Comp. St., 1901, p. 1437).

The "Colorado Doctrine" rejects *in toto* the common law doctrine of riparian rights. (Water Rights, Wiel, sec. 25.) It is in direct conflict therewith and with the "California Doctrine," in that it permits to the first actual appropriator and user the use of all the waters of natural streams for beneficial purposes, which includes the irrigation and cultivation of arid lands, whether they are riparian or nonriparian to the streams and irrespective of the own-

ership of the land. (Long on Irrigation, sec. 22.) Both doctrines recognize that the waters of streams may be appropriated to irrigate arid lands, and that the first appropriator has the prior and superior right; and that a valid appropriation constitutes a vested right in the appropriator which can not be taken away without "due process of law." (See Wiel, *supra*, sec. 54, and authorities there cited.) They do not agree, however, in respect to the question as to what constitutes a valid appropriation. Under the "California Doctrine," a grant of land from the United States, made before any actual appropriation by third parties of the waters therein, constitutes such a valid appropriation of the water as can not be disturbed by any subsequent actual appropriation, nor can the right so acquired to the water be lost or abandoned by failure actually to appropriate and use. (*Sturr* v. *Beck*, 133 U. S., 541, 551; Wiel, *supra*, secs. 23, 24, pp. 49–54.) "Use does not create the right, and disuse can not destroy or suspend it." (*Lux* v. *Haggin*, *supra*, p. 753.)

Under the "Colorado Doctrine" "An appropriation is an intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use." (*Clough* v. *Wing* (Ariz.), 17 Pac. Rep., 453, 457; Long on Irrigation, sec. 36, p. 68.) The first actual appropriator has the prior right to the extent of his appropriation. (Long, *supra*, sec. 83, p. 151; *Coffin* v. *Left Hand Ditch Co.*, 6 Colo.,

443; Wiel, *supra*, sec. 25, p. 57.) If the right so acquired is for irrigation purposes, it is "subservient to" the use of the waters "in tilling the soil." (*Clough* v. *Wing*, *supra*, 453, 456; Wiel, p. 58.) And the continuance of the right depends upon the continued use of the waters; hence may be lost by abandonment or nonuser. (Long on Irrigation, sec. 83, p. 151, and authorities there cited.)

The "California Doctrine" differs from the "Colorado Doctrine" and resembles the strict common law doctrine, in that the proprietors of lands through which a living stream flows may, by grant or otherwise, dispose of the waters flowing therein separate and apart from the lands, and such grant is valid as against every one except, perhaps, riparian owners below. That such is the rule at common law is too well settled to admit of discussion and is fully sustained by the following authorities:

Water and Water Rights (Farnham, vol. 3, sec. 725, p. 2203); Gould on Waters, sec. 299; Water Rights in the Western States, Wiel, sec. 211; *Hatch* v. *Dwight*, 17 Mass., 288, 298; *Duluth* v. *St. Paul R. R. Co.*, 49 Minn., 201, 209; *Rood* v. *Johnson*, 26 Vt., 64; *Miller* v. *Lapham*, 44 ib., 416.

That the same principle applies under the California doctrine has frequently been held, as reference to the following authorities will show: Kinney on Irrigation, sec. 285; Water Rights in the Western States (Wiel), secs. 24, 211; *Lux* v. *Haggin*, 10 Pac. Rep., 674; *Cross* v. *Kitts*, ib., 409, 412; *Gould* v.

Eaton, 49 ib., 577; *Doyle* v. *San Diego Land and Town Co.* (U. S. Dist. Ct. Calif.), 46 Fed Rep., 709, 711; *Cruse* v. *McCauley*, 96 ib., 369, 374.

In the Doyle case, 46 Fed. Rep., 711, Mr. Circuit Judge Ross uses the following language:

> It has also been many times decided by the Supreme Court of California, as well as by the Supreme Court of the United States, that the waters of nonnavigable running streams in California may be acquired by appropriation for any or all of the purposes already mentioned. (*Irwin* v. *Phillips*, 5 Cal., 140; *Ortman* v. *Dixon*, 13 Cal., 38; *McDonald* v. *Water & Min. Co.*, id., 232; *McKinney* v. *Smith*, 21 Cal., 381; *Canal Co.* v. *Kidd*, 37 Cal., 314; *Atchison* v. *Peterson*, 20 Wall., 511; *Basey* v. *Gallagher*, id., 682.) If such waters can be acquired by appropriation and by condemnation proceedings, *a fortiori*, they may be acquired by express grant of the owner of the land over which they run. (*Cross* v. *Kitts*, 69 Cal., 222, 10 Pac. Rep., 409.)

Among the purposes "mentioned" was that of irrigating arid lands.

In the *Cruse* case, 96 Fed. Rep., at p. 374, District Judge Knowles says, among other things:

> As the United States then owns the waters which are an incident to its lands, it can dispose of them separate from its lands if it chooses.

The "California Doctrine" differs from the common-law doctrine and resembles the "Colorado Doc-

trine," in this: That while lands are "public lands," belonging either to the United States or a State, the waters of streams flowing through the lands may be appropriated and used for beneficial purposes, the first in time being first in right, and subsequent purchasers of lands riparian to said streams acquire the same subject to such prior appropriation and use of such waters. (See Wiel, *supra*, sec. 24, Kinney on Irrigation, sec. 185, and authorities there cited. Also *Carson* v. *Gentner*, 33 Oreg., 512.)

From what has preceded, it follows that if, at the time the agreement in question became effective, the so-called "California Doctrine" prevailed in Montana, then the reservation of the waters contained in said agreement is valid as against all subsequent appropriators of the waters of Milk River and its tributaries, and also as against all persons who have since acquired from the United States any lands, whether riparian or non-riparian, to said river or its tributaries.

The agreement in question secured to the Indians a title by occupancy to the lands so set apart. Such title, however, is "as sacred as that of the United States to the fee." (*United States* v. *Cook*, 19 Wall., 591, 593; *Johnson* v. *McIntosh*, 8 Wheat., 543; *Beecher* v. *Wetherby*, 95 U. S., 517, 526.) "Something not to be taken away * * * except by * * * consent" of the Indians, "and then upon such consideration as should be agreed upon." (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 389.) If

their title by occupancy to the lands is thus secured it would seem to follow that their right to the use of water which was reserved in the same instrument is equally secured and equally sacred. Especially would this seem to be true in view of the facts that appellants have derived what title they possess to their respective lands from the same source as the Indians, and subsequently to them, and that patents to the former, if and when delivered, will each contain the following clause, viz, "subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes." (*Cruse* v. *McCauley*, 96 Fed. Rep., 369, 374.)

The so-called "California Doctrine," and not the "Colorado Doctrine," at the time said agreement became effective, prevailed in Montana, and ever since has prevailed there.

In respect to the above statement Wiel, in his treatise entitled "Water Rights in the Western States" (1905), at section 18, says, among other things: "The California Doctrine is in force in * * * Montana." The decision of the Supreme Court of the State of Wyoming (August 3, 1903), in *Willey* v. *Decker*, *supra* (214, 221), is to the same effect. In that case there was involved the question in respect to the right to the use of the waters of Young's Creek, a Wyoming-Montana interstate stream, "having its source in the State of Montana and flowing thence in a general southeasterly course into Sheridan County, Wyo." (210, 211). The con-

test was between appropriators for irrigation purposes, some of whom used the waters of the stream to irrigate lands in Wyoming, while others used said waters to irrigate lands in Montana. It became necessary for the court to consider and determine, among other questions, the one in respect to the doctrine which governed the waters of natural streams in Montana. The opinion is able and exhaustive. The court seems to have examined and analyzed all the authorities on the subject, many of which are cited. As a conclusion from them the court, among other things (p. 214), said:

> In both this State and the State of Montana, through which Young's creek flows, the doctrine of prior appropriation is recognized and applied. The adoption of the doctrine by the State of Montana, however, as indicated by the decisions of its courts, has not proceeded upon precisely the same theory, nor have the courts of that State gone to the extent that we have in abrogating the common-law rule of riparian rights in respect to the use of flowing water. In that State the doctrine more generally known, perhaps, as the "California doctrine," prevails.

And again (p. 221) referring to Montana, the court further stated:

> It is there held that the right to the use of running water follows the ownership of riparian soil, and that a water right can be acquired only by the grant, express or implied, of the owner of such soil.

The right to the use of the waters involved which was reserved to the Indians by the agreement in question can not be adversely affected by any local law, usage, or custom of either the Territory or the State of Montana.

On March 12, 1885, the legislative assembly of the Territory of Montana passed an act entitled "An act relative to water rights" (Session Laws of Montana, 1885, pp. 130–132), sections 1, 2, 5, 6, 7, 8, and 9 of which read as follows:

> SEC. 1. That right to the use of running water flowing in the rivers, streams, canyons, and ravines of this Territory may be acquired by appropriation.
>
> SEC. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.
>
> * * * SEC. 5. As between appropriators, the one first in time is first in right.
>
> SEC. 6. Any person hereafter desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: First, the number of inches claimed, measured as hereinafter provided; second, the purpose for which it is claimed and place of intended use; third, the means of diversion, with size of flume, ditch, pipe, or aqueduct, in which he intends to divert it; fourth, the date of appropriation; fifth, the name of the appropriator. Within

twenty days after the date of appropriation the appropriator shall file with the county recorder of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion on such stream with reference to some natural object or permanent monument. The recorded notice shall be verified by the affidavit of the appropriator, or some one in his behalf, which affidavit must state that the matters and things contained in the notice are true.

SEC. 7. Within forty days after posting such notice the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this act.

SEC. 8. A failure to comply with the provisions of this act deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith,

but by complying with the provisions of this act, the right to the use of the water shall relate back to the date of posting the notice.

SEC. 9. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this act, file in the office of the recorder of the county in which the water right is situated a declaration in writing, except notice be already given of record as required by this act, the same facts as required in the notice provided for record in section 6 of this act, such declaration shall be verified as required in section 6 of this act, in cases of notice of appropriation of water: *Provided*, That a failure to comply with the requirements of this section may in nowise work a forfeiture of such heretofore acquired rights, nor prevent any such claimant from establishing such rights in the courts.

These sections subsequent to the year 1885, and prior to any diversion of any of the waters here involved by either party, became a part of the laws of the State of Montana, and now appear in Vol. I, Montana Codes Annotated (1895), as sections 1880, 1881, 1885, 1886, 1887, 1888, and 1889.

It is contended by counsel for appellants here, as it was contended by them in the courts below, that under the provisions of sections 5 and 8 the right of the Indians to the use of the waters involved is subordinate to the rights of appellants thereto. Such contention, we submit, is without merit.

As we have heretofore shown, the force and effect of the word "appropriation," as the same is used in

the first section, and of the word "appropriators" as the same is used in the fifth section, do not mean an actual appropriation or diversion, nor one who actually appropriates and uses, as said words are understood where the "Colorado Doctrine" prevails, unless the appropriator made his appropriation from the waters of a stream which at the time flowed through "public lands" belonging either to the United States or a State. (*Willey* v. *Decker, supra*, 214.)

The question, therefore, presented by the aforesaid contention of appellants is whether the right to the use of the waters in controversy which was reserved to the Indians by the agreement in question, which reservation, under the "California doctrine," was in effect an "appropriation" for their benefit, was lost or in any manner affected by their failure to comply with said sections 6 and 7. In other words, whether, as urged by appellants' counsel in their brief to support the second appeal (p. 99), "the grant of the Government must be construed according to the laws of" Montana.

Our contention is that such right was neither lost nor adversely affected by such failure. This contention is based upon the following proposition, which is sustained by the decisions of this and other courts, viz:

In ratifying the agreement in question Congress declared in effect that the reservation of the waters in controversy "was necessary for the beneficial uses of the Government property," therefore, in the ab-

sence of specific authority from Congress, neither the legislature of a Territory nor of a State has power to enact any law which would disturb or adversely affect any right guaranteed to the Indians by the agreement. (*McKnight* v. *United States*, 130 Fed. Rep., 659, 665; *Rio Grande Dam and Irrig. Co.*, 174 U. S., 690, 703; *Gutierres* v. *Albuquerque Land and Irrig. Co.*, 188 U. S., 545, 554, 555; *United States* v. *Rickert*, Ib., 432, 437, 438 et seq.; *United States* v. *Winans*, 198 U. S., 371, 379, 384; *Kansas* v. *Colorado et al.*, 206 U. S., 46.)

It is respectfully submitted that the decree appealed from should be affirmed.

HENRY M. HOYT,
Solicitor-General.

A. C. CAMPBELL,
Special Attorney.

APPENDIX.

[Memorandum order, Circuit Court; Record Circuit Court of Appeals, first appeal, pp. 83–86.]

THE TREATY OF 1888.

"I think that an injunction should be granted. Prior to 1888 nearly the whole of northern Montana north of the Missouri River and eastward from the main chain of the Rocky Mountains was recognized as Indian country, occupied in part by the tribes of Indians now living upon the Fort Belknap Reservation. By treaty of May, 1888, the Indians 'ceded and relinquished to the United States' their title and rights to lands not embraced within the reservation then established as their permanent homes. The purposes of the treaty were that means might be had to enable the Indians to become 'self-supporting as a pastoral and agricultural people, and to educate their children in the paths of civilization.'

"The consideration for the cession and relinquishment was that the United States should spend annually a large sum of money for the Indians in the purchase of live stock, agricultural implements, and other things in assisting the Indians to build homes and inclose their farms, and in any other respect to promote their civilization, comfort, and improvement.

(Article III, Treaty of May 1, 1888, 25 Statutes at Large, 114.)

"The 'cultivation of the soil' was also specially mentioned by Article V of the treaty.

CONSTRUCTION OF THE INSTRUMENT.

"A fair construction of the preamble and provisions of the treaty is that an essential object thereof was to encourage farming among the Indians. This being correct, notice of conditions of climate and soil of Montana tells us that water for irrigation is indispensable in successful farming throughout that portion of Montana wherein the Belknap Reservation lies.

"The parties to the agreement evidently appreciated this necessity, and purposely fixed a boundary line of the reservation at a point in the middle of the main channel of Milk River, opposite the mouth of People's Creek, and thence up Milk River in the middle of the main channel thereof to the place of beginning.

"I believe the intention was to reserve sufficient of the waters to insure to the Indians the means wherewith to irrigate their farms.

"This construction of the treaty seems to me to be in accord with the rules which the Supreme Court has repeatedly laid down in arriving at the true sense of treaties with Indians.

United States vs. Winans, decided May 15, 1905.

IRRIGATION WAS CONTEMPLATED.

"While in the treaty of October 9, 1895 (29 Stat., 350), reference is made to a scarcity of water which renders the pursuit of agriculture 'difficult and uncertain,' yet article II of that treaty expressly refers to the irrigation of the farms of the Indians.

"Irrigation was undoubtedly contemplated and was provided for, although the treaty of 1895 recognized that probably the main reliance of the Indians for self-support would be found in cattle raising.

"In my judgment, when the Indians made the treaty granting rights to the United States they reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees as well as against the State and its grantees.

"From this it follows that patents, if any, issued by the Land Department for lands held by defendants are subject to the treaty, and defendants can acquire no rights to the exclusion of the reasonable needs of the Indians. These needs appear to be 5,000 inches. To that extent injunction will issue."

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

HENRY WINTERS ET AL., APPELLANTS,
v.
THE UNITED STATES.
No. 158.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

Want of jurisdiction in Circuit Court of Appeals due to lack of necessary parties to the appeal from the Circuit Court.

The precise question presented by the record is whether, owing to the fact that five of the defendants against whom a judgment *pro confesso* was entered on account of their failure to answer after being served with subpœna (R., 11, 20), and against whom the injunction was granted by the final decree of the Circuit Court, as well as against the fourteen defendants who had filed a joint and several answer (R., 11, 20), were such necessary parties to the appeal taken to the Circuit Court of Appeals that, having been taken by the fourteen answering defendants

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only, without a summons and severance or other equivalent proceeding, and the case having been heard in the Circuit Court of Appeals without objection, upon its merits, the decree of the Circuit Court of Appeals should now be reversed for want of jurisdiction and the case remanded with instructions to dismiss the appeal from the Circuit Court.

In view of the far-reaching importance of jurisdictional questions of this character and the lack of exact precedent upon some of the precise points involved, making their proper application a matter of great doubt, it is felt that it is very desirable that the authorities which bear most directly upon the question should be submitted to the consideration of the court for authoritative and exact determination of the rules of practice which are in issue.

It is, of course, well settled that all parties against whom a joint judgment or decree is rendered must join in prosecuting a writ of error or appeal, and that if prosecuted by less than the whole number of such parties, without a summons and severance or other equivalent proceeding, the Appellate Court acquires no jurisdiction of the case and the writ of error or appeal will be dismissed. (*Williams* v. *Bank of United States*, 11 Wheat., 414; *Owings* v. *Kincannon*, 7 Pet., 399; *Heirs of Wilson* v. *Insurance Company*, 12 Pet., 140; *Mussina* v. *Cavazos*, 6 Wall., 355; *Masterson* v. *Herndon*, 10 Wall., 416; *Hampton* v. *Rouse*, 13 Wall., 87; *Simpson* v. *Greeley*, 20 Wall., 152;

Feibelman v. *Packard*, 108 U. S., 14; *Estis* v. *Trabue*, 128 U. S., 225, 230; *Mason* v. *United States*, 136 U. S., 581; *Dolan* v. *Jennings*, 139 U. S., 385; *Hardee* v. *Wilson*, 146 U. S., 179; *Inglehart* v. *Stansbury*, 151 U. S., 68; *Davis* v. *Mercantile Trust Company*, 152 U. S., 590; *Beardsley* v. *Railway*, 158 U. S., 123, 127; *Wilson* v. *Kiesel*, 164 U. S., 248.)

In *Masterson* v. *Herndon* (10 Wall., 416), Mr. Justice Miller, delivering the opinion of the court, said that one of the two reasons for this rule is "that the appellate tribunal shall not be required to decide a second or third time the same question on the same record," and that such proceedings should be had below as to estop the party not joining in the appeal "from bringing another appeal for the same matter," this being a point "to which this court has always attached much importance." In *Simpson* v. *Greeley* (20 Wall., 152), the court said that such a controversy can not be properly reexamined "by installments."

It is equally well settled that when all the necessary parties are not joined in an appeal or writ of error or proceedings had in the nature of a severance, the case is not legally before the appellate court, and it has no jurisdiction to try it. (*Wilson's Heirs* v. *Insurance Company*, 12 Pet., 140; *Dolan* v. *Jennings*, 139 U. S., 385.) In *Estis* v. *Trabue* (128 U. S., 225, 230) it was held that in such case this court will "of its own motion dismiss the case, without awaiting the action of a party."

It is insisted, however, by appellants that the present case falls within the equally well-recognized exception to the general rule, that where the interest of the parties is entirely separate and distinct and the decree below does not affect them jointly—as, for example, where there is a separate and distinct money judgment against one of the defendants alone—a party whose claim is entirely separate and distinct from that of the others may prosecute a separate writ or error or appeal, without any proceeding in the nature of a severance, for the purpose of protecting his own separate interest in the matter in which the other parties have no concern and as to which they are not interested in maintaining or reversing the decree below. (*Todd* v. *Daniel*, 16 Pet., 521, 523; *Germain* v. *Mason*, 12 Wall., 259; *Forgay* v. *Conrad*, 6 How., 201; *Brewster* v. *Wakefield*, 22 How., 118, 129; *Milner* v. *Meek*, 95 U. S., 252; *Basket* v. *Hassell*, 107 U. S., 602, 608; *Hanrick* v. *Patrick*, 119 U. S., 156; *City Bank* v. *Hunter*, 129 U. S., 557; *Gilfillan* v. *McKee*, 159 U. S., 303, and other cases cited by appellants.)

The first question presented, therefore, is whether the decree below adjudging the complainants' right to the flow of the waters of Milk River as against all of the defendants before the court is a joint decree within the meaning of the rule or a severable decree within the meaning of the exception.

While in several of the cases in which the exception to the general rule has been recognized the precise facts do not fully appear, nevertheless the proposition

seems fairly deducible from the weight of authority, that although the interest of several defendants below might have been severable in the sense that each had a separate claim as to his own interest, yet where the case was heard below as one case and a judgment or decree rendered below in complainants' favor against all the defendants, based upon a common ground which affects the separate interest of all the defendants alike and gives them a common interest in the disposition of the questions involved in the affirmance or reversal of the decree below, a separate writ of error or appeal is not permitted, as the appellate court will not dispose of such questions by installments at the instance of a part only of the parties adversely affected by the common decree below.

The exception to the general rule requiring a joinder of the parties and its limitations is clearly formulated in *Simpson* v. *Greeley* (20 Wall., 152). This was an action of ejectment for the recovery of "several tracts of land" (p. 159), brought against the defendant Simpson and eight other defendants, who were his tenants upon these lands, in which a judgment was rendered against all of the defendants for the recovery of the lands, with separate judgments against the defendant Simpson alone for $4,300, for the value of rents and profits and timber taken, and against the eight other defendants jointly for $2,600, as rents, to be credited as a part of the $4,300, if collected. It was held that a writ of error prosecuted by the defendant Simpson alone should be dismissed

because the eight other defendants had not been joint or severed. The court said:

> Cases arise, beyond all doubt, where only one of several defendants is affected by the judgment or decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error may carry up the case without joining the others in the appeal or writ of error. Exceptional cases of the kind occasionally arise, but where the interest is joint and the interest of all is affected by the judgment the rule is universal that all must join in the writ of error, else it is open to the other party to demand that it be dismissed, unless a severance of the parties in interest has been effected by summons and severance or by some equivalent action appearing in the record. * * * Viewed in the light of these suggestions, it is quite clear that the writ of error in this case must be dismissed, as all the defendants are directly or indirectly affected by the judgment in respect to the damages and rents, issues, and profits, as well as the judgment that the title to the lands described in the declaration is in the present defendants. Such a controversy can not be properly reexamined here by installments, nor unless all the parties to be affected by the result are before the court.

So in *Owings* v. *Kincannon* (7 Pet., 399) it was held that the rule requiring all the defendants against whom a joint judgment had been rendered to join in prosecuting a separate writ of error or appeal

applied to a decree rendered under a bill brought to quiet complainant's title to land against several defendants who claimed under a later entry; in *Masterson* v. *Herndon* (10 Wall., 416), to a decree against two defendants under a bill of peace to remove clouds from complainant's title; and in *Hampton* v. *Rouse* (13 Wall., 187), to a "joint judgment against several" in an action of ejectment; there being, however, nothing in either of the last two cases to show whether the several defendants were claiming under the same or different titles. And in *Wilson's Heirs* v. *Insurance Company* (12 Pet., 140) it was held that this rule applied to a judgment of sale rendered in proceedings instituted against the widow and children of a mortgagor to procure the sale of the mortgaged property, and that a writ of error prosecuted by the children alone should be dismissed because the widow had not joined therein.

It would seem that in most, if not all, of the foregoing cases the interest claimed by each of the defendants was technically a distinct claim from that of his codefendants; for example, the claim of one tenant to one portion of land being a separate claim from that of another tenant to another portion of land under the same landlord, and the community interest of a widow in mortgaged property being a distinct interest from the claim of the children to the remainder in fee; yet in each of these cases the same common questions were involved as to the superior right of the complainant to recovery as

against the separate interests claimed by the several defendants, and in each it was held, in effect, that the common recovery granted complainant against all of the defendants, although affecting their several interests separately, was nevertheless a joint judgment within the meaning of the rule requiring all the parties thus adversely affected to be joined in the appellate proceedings.

In the case at bar the answering defendants filed a joint and several answer setting up, respectively, the same general defenses and not differentiating even as to the amount of water which each claimed, merely asserting in the aggregate the right to appropriate 5,000 miner's inches (Ans. R., 17), and all alike denying the superior right of the complainant to the flow of the water in question.

It is submitted that a case of this character is closely analogous to an action of ejectment against several defendants having separate interests in the land claimed by complainant, and that in the one case, as in the other, as the decree below adjudging the complainant's right to the water or to the land in controversy affects all the,defendants jointly, and the interest of all is alike adversely affected by the decree below, the case at bar is brought within the "universal rule" stated in *Simpson* v. *Greeley*, requiring all the defendants so affected to join in the appeal, and preventing the questions involved from being brought up to the Appellate Court in successive instalments by the separate defendants below, merely on

the ground that the claim of each is separate as to his own interest, although affected alike by the joint decree.

This conclusion follows directly in so far as the rule in question is based upon the reason stated in *Masterson* v. *Herndon*, that the court shall be protected from being required to decide anew the same question in successive installments, since although the interest of the defendants below is in a sense separate, they have in this litigation a paramount and common interest which is alike affected adversely by the decree below, and each successive appeal would necessarily involve in the first instance a determination of the complainant's right to the uninterrupted flow of the water in question.

If the rule relied on is otherwise applicable to the case at bar, it seems doubtful whether its operation should be prevented by reason of the fact that a judgment *pro confesso* had been taken against the five defendants who did not join in the appeal, since a prime object of the rule is to prevent successive appeals involving the same question, and a defendant against whom a *pro confesso* has been taken has the same right to an appeal as any other defendant and may be injured not less by the judgment below, though rendered by default, than if it had been rendered after plea. (*Macker's Heirs* v. *Thomas*, 7 Wheat., 529.)

To illustrate: In the case at bar the appeal to this court was granted by the Circuit Court of Appeals on October 17, 1906 (R., 36), within less than the

six months after the decree in the Circuit Court, which was rendered on April 21, 1906 (R., 20), so that after this case had been appealed from the Circuit Court of Appeals it would have been entirely possible for the five other defendants, not being estopped by any severance, to have then appealed from the original decree and presented for reconsideration by the Circuit Court of Appeals at least the fundamental question as to complainant's right to the entire flow of water in Milk River which is presented under the bill, and subsequently to bring up again the same question to this court by an independent appeal.

In *American Loan & Trust Co.* v. *Clark* (83 Fed., 230), in which a somewhat analogous question was involved, it was held by the Circuit Court of Appeals for the Eighth Circuit that an appeal taken from a decree rendered on the petition of receivers for instructions must be dismissed because a certain railway company was not made a party to the appeal and there had been no summons and severance, this railway company having been made a party to the original petition of the receivers for instructions and duly served with notice, although it neither answered the petition nor appeared before the master on any of the hearings, nor excepted to his findings nor appeared in the Circuit Court on the final hearing.

The last question presented upon the point of jurisdiction is whether, if there was a want of jurisdiction in the Circuit Court of Appeals for lack of neces-

sary parties to the appeal, such defect was waived by the final decree entered on the merits without objection on that score.

It was held in *Union & Planters' Bank* v. *Memphis* (189 U. S., 71, 73) that where diversity of citizenship did not exist and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution, a decree rendered by the Circuit Court of Appeals upon an appeal to that court would, upon a subsequent appeal to this court, be reversed, not on the merits, but by reason of want of jurisdiction in the Circuit Court of Appeals, and remanded to that court with a direction to dismiss the appeal from the Circuit Court.

In view of the fact that it has been repeatedly held that the want of necessary parties to an appeal is a jurisdictional defect, and, as held in *Estis* v. *Trabue* (128 U. S., 225), one for which the court will, of its own motion, dismiss a writ of error, in the event the court should hold that there was a lack of necessary parties to the original appeal, this record would then present the direct question whether such jurisdictional defect in the Circuit Court of Appeals, is one which, as in *Union & Planters' Bank* v. *Memphis*, is not cured by a final decree in that court, or whether the cases are to be distinguished on the ground that the suit in that case was one entirely outside of the jurisdiction of the Circuit Court of Appeals, and that the same rule does not apply to a jurisdictional defect which is based solely upon a lack of necessary parties. No adjudication of this precise question has

been found, and it would appear to be now for the first time directly presented for determination by this court.

II.

Pleadings and admitted facts.

Where a case is heard on bill and answer "all the facts alleged in the bill, and not denied in the answer, as well as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law." (*In re Sanford Fork and Tool Co.*, 160 U. S., 247, 255.)

The essential facts as thus admitted under the pleadings, disregarding mere conclusions of law, which, of course, are not admitted (*General Electric Company* v. *New England Electric Mfg. Co.*, 128 Fed., 739; *General Electric Co* v. *Bullock Electric Mfg. Co.*, 138 Fed., 412), are as follows:

By the act of Congress of April 15, 1874, there was set apart as a reservation for the Gros Ventre and other Indian tribes a large tract of land in the northern part of Montana traversed by the Milk River. By the act of Congress of May 1, 1888 (25 Stat., 113), ratifying an agreement that had been made with these tribes, three smaller reservations were created out of the reservation of 1874, known, respectively, as the Fort Belknap, Fort Peck, and Black Feet reservations. The Fort Belknap Reservation, which is alone in question here, lay on the south side of Milk River, having the center line of the river as its southern boundary. By this agreement it was

reserved for the Gros Ventre and Assiniboine Indians, who in turn ceded to the United States all their title in the remainder of the larger reservation of 1874. The sole purpose of the agreement, as recited in the preamble, was to enable the Indians to dispose of so much of the reservation of 1874 as they did not require "in order to obtain the means to enable them to become self-supporting, as a pastoral and agricultural people, and to educate their children in the arts of civilization." (Bill, R., 2; Ans., R., 14.)

The Fort Belknap Reservation has ever since been an Indian reservation and the property of the United States, subject to the occupancy of the Indians, and occupied by them as their permanent home and abiding place. (Bill, R., 3; admitted, Ans., R., 12.) The remainder of the original reservation of 1874 was open to entry as a part of the public domain by the act of May 1, 1888. (Ans., R., 14.)

Large portions of the Fort Belknap Reservation are suitable for pasturage, grazing and agricultural purposes. (Bill, R., 3; admitted, Ans., R., 12.) However, the portions of the reservation which are adapted to agricultural purposes are dry and arid and require large quantities of water for irrigation in order to make them productive. (Bill, R., 3; admitted, Ans., R., 12).

In 1889 the United States erected buildings on the reservation for the Fort Belknap Agency, which have since been occupied by the Indian agent and the officers and agents of the Government. (Bill, R. 3; admitted, Ans., p. 12.)

In 1889 the United States appropriated and diverted from Milk River 100 miners' inches of water for domestic purposes and for the irrigation of lands adjacent to the agency buildings, and subsequently, in 1893 or 1894, took additional waters amounting to about 150 inches, making a total taking for such purposes of about 250 inches. (Bill, R. 4, in so far as admitted by the Ans., R., 12.)

[By the act of February 22, 1889, providing for the admission of Montana into the Union on an equal footing with the original States, it was provided that the people of the State should forever disclaim all right and title to all lands within its limits owned or held by Indian tribes. (25 Stat., 676, 677.)]

Some time subsequent to the erection by the United States of its pumping plant of a capacity of 250 miners' inches, the defendants made entries upon portions of the public lands lying on Milk River outside of the Fort Belknap Reservation, but within the boundaries of the reservation of 1874, and obtained patents therefor, the lands so patented being arid lands and requiring irrigation for their successful cultivation; and, subsequently, but prior to July 1, 1898, appropriated to their several uses for beneficial uses, in compliance as they allege with the laws, decisions, and customs of Montana, 5,000 miners' inches of the waters of Milk River, and have expended many thousands of dollars in constructing irrigation works and other improvements, the value of the use of such water to them exceeding $100,000.00; and a large number of other persons have also settled on

the waters of Milk River in communities to which the use of water for irrigation is essential. (Ans., pp.15–18.)

On or about July 5, 1898, or four days later than the date alleged by the defendants as the date prior to which their appropriations were made, the United States took and diverted from the river about 5,000 inches of water which it used for purposes of irrigating about 30,000 acres of the reservation for agricultural purposes, but this appropriation is not alleged to have been made under the laws or customs of Montana. (Bill, R. 4, in so far as admitted by the Ans., R. 12.)

It is further specifically alleged in the bill that in order to enable the United States to maintain the Agency and to promote civilization among the Indians and to make these agricultural lands susceptible of cultivation "it is essential and necessary that all of the waters of said Milk River should be permitted to flow down the channel of said river uninterrupted by and undiminished in quantity, and undeteriorated in quality" (Bill, R., 6). This is nowhere denied in the answer and is, hence, admitted; for, while it is alleged that there are situated on the reservation several available streams and springs flowing, in the aggregate, about 2,900 inches of water (Ans., p. 18), it is not alleged that these other waters are sufficient for the purpose of the Agency, and it is no where denied that the uninterrupted flow of all the waters of the river is essential to the maintenance of the Agency.

As the case then stands under the bill and answer, the rights claimed by the Government in behalf of the reservation and those claimed by the defendants are in irreconcilable conflict, and the question is squarely presented as to the superior right to water essential to the development of the agricultural resources of the reservation as between the Government and Indians on the one hand, who are prior both in settlement upon the river and in commencing the actual use of the water, and the appellants on the other hand, who entered upon the lands later than the Indians and after the Government had actually begun to use the waters for the purposes of the reservation, and the question is directly presented as to whether the Government can be prevented from using all the water that is necessary for the complete development of the agricultural resources of the reservation by an intermediate appropriation made by the defendants apparently about four days before the appropriation made by the Government which was essential under its completed plans for the development of the reservation; in other words, whether the beneficial use of the reservation may be virtually destroyed by such an interjected appropriation of the water made by persons who entered upon the waters of Milk River after the reservation had been established and the use of the water for reservation purposes had been commenced.

The bill, furthermore, is not based upon any right claimed by the Government by virtue of any appro-

priation of water under the laws and customs of the State of Montana, the actual appropriations made by the Government being merely recited in the historical statement of facts, but there being no averment that its appropriations had been made in any way in pursuance of Montana laws or customs, or that it claimed any rights by virtue of such laws and customs.

On the contrary, the plain theory of the bill, as set forth especially in sections 8 and 9 (R., 5–7), is that the Government, as owner of the reservation, subject to the occupancy of the Indians, and having right to the water as a riparian owner and otherwise, is entitled to protect the uninterrupted flow of water in the river which is necessary to the development of the agricultural resources of the reservation, and essential in order that the Government may fulfill its duty in advancing the civilization and improvement of the Indians upon the reservation.

III.

The United States by setting apart and holding this tract of land as an Indian reservation thereby reserved it from the public domain and exempted from subsequent adverse appropriation, under either the public-land laws of the United States or the laws and customs of Montana, the uninterrupted flow of all water necessary to its beneficial use.

The Fort Belknap Reservation is a part of the land acquired by the United States under the Louisiana cession, and continuously, since at least 1856, has been included within lands specifically set apart and held as an Indian reservation.

By the Indian treaty proclaimed April 25, 1856, there was set apart for the Gross Ventre and other tribes all that part of the State of Montana lying north of Muscle Shell River and including the Milk River. (11 Stat. 657, 658.)

By the act of Congress of April 15, 1874, c. 96 (18 Stat., 28), a tract lying in the northern part of Montana traversed by the Milk River was again specifically set apart as a reservation for the Gross Ventre and other Indian tribes.

Both the reservations of 1856 and of 1874 included the entire waters of Milk River and its tributaries lying within the present State of Montana, and embraced all the land now included in the Fort Belknap Reservation.

By the agreement ratified by the act of Congress of May 1, 1888, c. 213 (25 Stat. L., 113), the present Fort Belknap Reservation was created out of a portion of the reservations of 1856 and 1874, and having the center line of Milk River as its northern boundary.

This tract of land has therefore been continuously held by the United States as an Indian reservation since, at least, 1856.

1. The title to this land has therefore been continuously held in fee by the United States as an Indian reservation, with a right of occupancy in the Indians, and the exclusive right in the United States of extinguishing their occupant claim. (*Johnson* v. *McIntosh*, 8 Wheat, 542, 603; *United States* v. *Cook*, 19 Wal., 591; *Leavenworth, etc., Railroad*

Co., v. *United States*, 92 U. S., 733; *Missouri, etc., Ry. Co.* v. *Roberts*, 152 U. S., 114.)

2. *The continued flow of water necessary for the beneficial use of Government property bordering on a stream, which has been set apart for a special use and reserved from the public domain, is, in the absence of specific authority from Congress, exempt from adverse appropriation under either national or State laws.*

In *United States* v. *Rio Grande Dam & Irrigation Co.* (174 U. S., 690), in which it was held that the United States was entitled to restrain an irrigation company from appropriating the waters of the Rio Grande within the Territory of New Mexico in such manner as to diminish the navigability of that stream, Mr. Justice Brewer, delivering the opinion of the court, after stating that as to every stream within its dominion a State may change "the unquestioned rule of common law * * * that every riparian owner was entitled to the continued natural flow of the stream," and may permit the appropriation of flowing waters for such purposes as it deems wise, a power which was likewise conceded *arguendo* to a Territory, said:

> Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State, yet *two limitations must be recognized:* First, that in the absence of specific authority from Congress a State can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued

> flow of its waters, so far at least as may be necessary for the beneficial uses of the Government property; second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States (p. 703).

Further, after quoting the provisions of the act of Congress of July 26, 1866, c. 262, recognizing as to the public domain the validity of local laws and customs in respect to the appropriation of water, the desert-land act of March 3, 1877, c. 107, and the act of March 3, 1891, c. 561, granting rights of way to irrigation companies, being the same statutes upon which appellants now rely, Mr. Justice Brewer, continuing, said:

> Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an exetnt as to destroy their navigability is to carry those statutes beyond what their fair import permits. * * *
>
> To hold that Congress, by these acts, meant to confer upon any State the right to appro priate all the waters of the tributary streams which unite into a navigable water course, and

> so destroy the navigability of that water course in derogation of the interests of all the people of the United States, is a construction which can not be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress (p. 706).

As the right of the Government to protect the flowage of waters necessary to the use of its riparian property is placed by this opinion on the same footing with its right to protect the navigability of streams, it follows, by parity of reasoning, that the acts of 1866 and 1877 and 1891 are no more to be construed as conferring a right to appropriate water in such manner as to interfere with the beneficial use of Government property than as conferring the right to make such appropriation so as to interfere with the navigability of the stream.

The doctrine of the Rio Grande case that in the absence of specific authority from Congress a State can not either destroy the right of the United States to the continued flow of water necessary to the beneficial use of Government property bordering on a stream or interfere with the navigability of a stream, has been quoted and approved in two subsequent cases.

In *Gutierres* v. *Albuquerque Land Company* (228 U. S., 545, 554) Mr. Justice White, delivering the opinion of the court, said:

> Of course, as held in the *Rio Grande case*, even a State, as respects streams within its

> borders, in the absence of specific authority from Congress, "can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the Government property;" and the power of a State over navigable streams and their tributaries is further limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

And recently, in *Kansas* v. *Colorado* (206 U. S., 46), in which it was held that in an orginal suit brought by the State of Kansas to restrain the State of Colorado and certain of its corporations from diverting the water of the Arkansas River for the irrigation of lands in Colorado, as it was not claimed that the diversion of such waters tended to diminish the navigability of the river, the United States was not entitled to intervene under a claim of right to control the waters of the river to aid in the reclamation of arid public lands, in the opinion, which was delivered by Mr. Justice Brewer, the language in the *Rio Grande case*, that a State can not, by its legislation, destroy the right of the United States to the continued flow of waters necessary for the beneficial uses of Government property bordering on a stream, was quoted with approval (p. 86), the decision being put upon the ground that under the Constitution no powers were vested in the General Government in reference to the reclamation of arid lands lying

within the limits of a State which would override State laws in respect to the general subject of reclamation.

This opinion, therefore, in its essence, recognizes the doctrine of the *Rio Grande case* as applied to Government property set apart for a specific use, but holds that it is not to be extended to lands that have not been thus set apart and remain a part of the general public domain.

The question, then, directly arises as to whether the setting apart of a portion of the public domain as an Indian reservation is such an appropriation of a specific tract to a governmental use, and such a severance of the tract from the public domain, as to bring the land set apart and held by the Government for such purpose within the rule laid down in the *Rio Grande case* and recognized in *Kansas* v. *Colorado*.

Upon this point the Government relies upon the cases of Leavenworth, etc., R. R. Co. v. United States (92 U. S., 733), and *Missouri Pacific Railway* v. *Roberts (152 U. S., 114), in each of which it was held that under the doctrine of Wilcox v. Jackson (13 Pet., 498) the setting apart of lands as an Indian reservation, operated, as in the case of a military reservation, to sever them from the mass of the public lands and exempt them from the effect of general legislation in reference thereto.*

In *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 733) it was held that the doctrine that a tract lawfully appropriated by the Government to any purpose became thereafter severed from the mass of public lands so that no subsequent law would be

construed as operating upon it, although not specifically excepted in the act, applied to an Indian reservation as well as to a military reservation; that under this doctrine a general grant by Congress to the State of Kansas of certain lands within the limits of the State to aid in the construction of a railroad should be construed as excluding the reservation that had by treaty been previously set apart by the United States for the Osage Indians; and, further, that a proviso in such grant reserving from its operation all lands theretofore reserved to the United States for any purpose, applied to the lands that had been thus set apart for the Indian reservation. The court said:

> We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox* v. *Jackson* (13 Pet., 498) the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added: "We go further, and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it." It may be urged that it was not necessary in deciding

that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. * * * It applies with more force to Indian than to military reservations. The latter are the absolute property of the Government; in the former, other rights are vested. Congress can not be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose. * * *

That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government, and saved from a possible grant, is a proposition which will command universal assent. What ought to be done has been done. * * * All lands "heretofore reserved," that is, reserved before the passage of the act, "by competent authority, for any purpose whatsoever," are excepted by the proviso. This language is broad and comprehensive. It unquestionably covers these lands. They had been reserved by treaty before the act of 1863 was passed. It is said, however, that having been reserved, not "to the United States," but to the Osages, they are therefore not within the terms of the proviso. This position is untenable. * * * The verbal criticism, that these lands were not, within the meaning of this proviso, reserved "to the United States," is unsound. The treaty reserved them as much to one as to the other of the contracting parties. Both

were interested therein, and had title thereto. In one sense, they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians.

Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indians or for other purposes. There is an equal obligation resting on the Government to require that neither class of reservations be diverted from the uses to which it was assigned. * * * A construction which would limit it to land set apart for military posts and the like and deny its application to that appropriated for Indian occupation is more subtle than sound.

In *Missouri Pacific Ry. Co.* v. *Roberts* (152 U. S., 114,118) the doctrine of the *Wilcox* and *Leavenworth cases* was reaffirmed, and it was held under this doctrine that a reservation or grant from Congress to the State of Kansas of two specified sections of land for school purposes would not include lands which had been previously set apart for the Osage Indian Reservation. On this point the court said:

> If the reservation named was intended as a grant it could only apply to such lands as were public lands, * * * nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the land involved in this controversy, as we have already shown. As early as 1839 it was held

> in *Wilcox* v. *Jackson* (13 Pet., 498): "That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it." The reservation referred to there was of land for military purposes; and in *Leavenworth, Lawrence and Galveston Railroad* v. *United States* (92 U. S., 733, 745), it was said that this doctrine "applies with more force to Indian than to military reservations. The latter," the court observed, "are the absolute property of the Government. In the former other rights are vested. Congress can not be supposed to grant them in a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose."

The unquestionable effect of these decisions is to assimilate an Indian reservation to a military reservation or other property held for distinctively governmental purposes.

"These Indian tribes are the wards of the Nation. They are communities dependent on the United States. * * * From their very weakness and helplessness * * * there arises the duty of protection and with it the power. This has always been recognized by the Executive and Congress, and by this court whenever the question has arisen." (*United States* v. *Kagama*, 118 U. S., 375, 383.) "Chief Justice Marshall's description that 'they are in a state of pupilage,' and 'their relation to the United

State resembles that of a ward to his guardian,' has become more and more appropriate as they have grown less powerful and more dependent." (*Jones* v. *Meehan*, 175 U. S., 1, 10.)

The duty, as well as the right, of the United States to protect these wards of the nation and develop them in civilization has been immemorially recognized; it seems, therefore, clearly to follow, from the authorities above cited, that a tract of land set apart by the Government as a reservation for them and held by it for such purpose is just as much to be regarded as Government property dedicated to a specific Governmental use as lands set apart and held by it for a military reservation or an arsenal or any other similar use, and that, having been thus severed from the public domain and held for such specific purpose, the right to the flowage of water necessary to its beneficial use is not to be determined by the rule applicable to the case of arid lands, which are merely held in the general public domain without having been set apart for any Governmental purpose, but rather by that laid down in the Rio Grande case in reference to the use of water for Government property.

It is true that in *Krall* v. *United States* (79 Fed., 241) it was held by the Circuit Court of Appeals for the Ninth circuit that the right to appropriate water from a nonnavigable stream was not affected by the establishment of a military reservation, except in so far as the waters had been actually appropriated for the use of such reservation. However, there was not only a strong dissenting opinion by

Circuit Judge Gilbert in this case, but in the case at bar the same Circuit Court of Appeals, composed of the same three judges who sat in the *Krall* case, have virtually overruled the doctrine of that case in so far as it applies to the present case, and have held specifically that the United States is entitled to the flow of the waters of Milk River necessary to the beneficial uses of the Indian reservation upon the specific authority of the *Rio Grande*, *Wilcox*, and other cases here relied upon. (*Winters* v. *United States*, 143 Fed., 740, and 148 Fed., 684.)

It should be added that an appeal to this court in the Krall case was dismissed here for want of jurisdiction on the ground that the decree of the Circuit Court of Appeals was not final, the incidental language of the opinion "conceding" that a water right might be acquired against the United States, being manifestly a mere concession *arguendo*, not intended in any way as an adjudication upon the merits of the question. (*United States* v. *Krall*, 174 U. S., 385).

It is also to be noted that in *Story* v. *Woolverton* (31 Mont., 346), in which it was held by the Supreme Court of Montana that certain water rights claimed by the State of Montana as the purchaser from the United States of an abandoned military reservation on the banks of a river had not passed to the State by reason of the fact that the reservation had been abandoned prior to the conveyance of the land, the the court nevertheless incidentally recognized the doctrine that while the land was held by the United States for a military reservation it had the right

to use all the water flowing in the stream, and, inferentially at least, that it was not subject to appropriation of others until the reservation had been abandoned. The court said:

> Prior to the time of settlement upon the lands in question, and prior to the appropriation of the waters of Bear Creek by anyone, both the land and the water were the property of the Government. When the Government established the reservation, it owned both the land included therein and all the water running in the various near-by streams to which it had not yielded title. It was therefore unnecessary for the Government to "appropriate" the water. It owned it already. All it had to do was to take it and use it. When the Government abandoned the military reservation, it also must have abandoned the use of the water thereon, which was again allowed to flow in its regular channel as a part of the public domain, subject to the appropriation of anyone who sought to take it.

Furthermore, the desert land act of March 3, 1877, c. 107 (19 Stat., 377), under which the appellants claim the right to appropriate this water adversely to the Government, specifically provides that the right to the use of water granted under that act is "*subject to existing rights.*"

While appellants in their answers claim generally that their entries of lands were "made under the homestead and desert land laws of the United States" (R. 34), they do not show which of them entered

under the homestead laws and which under the desert land laws. Manifestly, if there were any greater right under the homestead laws than under the desert land laws it would be necessary for each of the defendants claiming priority under the homestead laws to specifically show that his entry was made under such law.

However, as we understood the statement of counsel at the bar of this court, the entries upon which they rely were in fact in large part, if not entirely, made under the desert land law.

IV.

Under the agreement creating the Fort Belknap Reservation the Indians did not cede or relinquish their right to the flowage of water essential to its beneficial use.

If it be held that the right to the use of water for this reservation is not controlled by the rule laid down in the *Rio Grande case* in reference to Government property, and that the question is to be determined solely with reference to the right retained by the Indians under the agreement of 1888 creating the Fort Belknap Reservation, it is submitted that, under the just and reasonable construction of this agreement, considered in the light of all the circumstances and of its express purpose, the Indians did not thereby cede or relinquish to the United States the right to appropriate the waters of Milk River necessary to their use for agricultural and other purposes upon the

reservation, but retained this right, as an appurtenance to the land which they retained, to the full extent in which it had been vested in them under former treaties, and that the right thus retained and vested in them under the agreement of 1888, at a time when Montana was still a Territory of the United States, could not be divested under any subsequent legislation either of the Territory or of the State.

On this point it is clear that the same principles are to control in construing and giving effect to the agreement as if this were a contest between the Government and the Indians, since appellants claim as subsequent grantees from the United States under patents issued by it, and, being privies in estate to the United States and subsequent grantees thereof, they stand, in reference to the construction of this agreement, in the same attitude as would the United States, and can have acquired under it no greater rights than were retained by the United States under the agreement.

While the United States may itself abrogate rights granted to the Indians under a treaty with them, it alone has this power, and unless such rights are abrogated by the United States itself by subsequent legislation it is well settled that all rights acquired by the Indians under the treaty are to be fully protected against invasion by other parties. (*The Cherokee Nation* v. *Georgia*, 5 Pet., 1; *United States* v. *Cook*, 19 Wall., 591.)

In *United States* v. *Winans* (198 U. S., 371, 380), Mr. Justice McKenna, delivering the opinion of the court, said:

> And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exercised by the strong over those to whom they owe care and protection," and counterpoise the inequality "by superior justice which looks only to the substance of the right without regard to technical rules. (119 U. S., 1; 175 U. S., 1)."

Prior to the agreement of 1888 the Indians, under the reservations both of 1856 and 1874, had occupied all the lands on both sides of Milk River, with the undisputed right to the entire flow of its water, and as the lands included in the present Fort Belknap Reservation had been included in both of the former reservations, they could at any time have appropriated all the waters of the river for use upon this tract if they had so desired.

Furthermore, as all the waters of Milk River had been contained within their former reservations and had never been made a part of the public domain, there had, prior to that time, been no possible way by which any other person, under any law of the United States or of a Territory, could have appropriated the use of this water for any purpose. (*Sturr* v. *Beck*, 133 U. S., 541; *Smith* v. *Denniff*, 24 Mont., 60; *Wilcox* v. *Jackson*,

13 Pet., 490; *Leavenworth, etc., Railroad Co.* v. *United States*, 92 U. S., 743.) Under these circumstances it is submitted that the right of the Indians to the continued use of the water as it had been vested in them under the prior treaties is not to be construed as lost unless expressly reserved to them under the agreement of 1888, but that it is incumbent upon appellants, in denying this continued right, to show affirmatively that under some provision of the agreement it was relinquished or abridged.

This agreement, made with the Indians in 1888, was the result of a general policy adopted by the Government to establish permanent homes for the Indians and instruct them in the arts of civilization, in order to make them a civilized and self-supporting people. Prior to this agreement and the location of these Indians upon the reservation fixed by its terms they had roamed over a territory in size entirely out of proportion to their needs, and maintained themselves largely by hunting and fishing. The object of this agreement is set forth in its preamble (25 Stat., 113), which clearly specifies the causes which induced the Indians to make the change, as follows:

> Whereas the reservation set apart by the act of Congress approved April 15, 1874, for the use and occupancy (of the Indians named in the act), is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their

> present prospective wants; and whereas the said Indians are desirous of disposing of so much thereof as they do not require, in order to obtain the means and enable them to become self-supporting as a pastoral and agricultural people, and to educate their children in the paths of civilization: Therefore, to carry out such purpose, it is hereby agreed, etc.

This preamble, which specifically states the purpose for which the agreement was entered into, and which was ratified by the act of Congress, shows that it was made solely for the benefit of the Indians, and especially to enable them to become a pastoral and agricultural people, and entirely nullifies the inference which appellants seek to draw, that its real purpose was to extinguish their claims to the remainder of the reservation of 1874 in order that it might be thrown open to general settlement. It certainly can not be inferred in the face of this specific statement, thus ratified by Congress, that the Government had a secret purpose in making the agreement in conflict with that which was stated; and, in view of the explicit statement in the preamble, it is clear that its several provisions are to be construed in the light of the purpose thus expressed, and not of any purpose conflicting therewith.

This purpose is emphasized by various other provisions of the agreement. Thus it is provided

in Article II that sums of money amounting to $430,000 are to be expended annually by the United Stated for the purchase, among other things, of live stock and agricultural implements, and the erection of shops necessary in assisting the Indians to build houses and inclose their farms; and in Article V that in the distribution of materials advanced by the United States preference shall be given especially to the Indians who "in good faith undertake the cultivation of the soil or engage in pastoral pursuits as a means of obtaining a livelihood." Under the agreement the northern boundary of the reservation is furthermore described as the middle of the channel of Milk River.

In view of the expresss purpose of this agreement to enable the Indians to become an agricultural and pastoral people, it is inconceivable that the Indians, by the agreement of 1888, intended to cede away a large portion of their lands, and at the same time surrender the right to the use of the waters of Milk River for the small fraction of the original reservation which they retained. Irrigation in Montana occupies the same relation to land that rain does in the humid regions. The use of the water of the streams on and bordering upon this reservation is as essential to the existence of the Indians as the air they breathe; its use is an essential, in fact, the most essential, feature in carrying out the terms of the agreement.

It is likewise inconceivable that the Government, in pursuance of its policy to establish these Indians upon a reservation where they could engage in agricultural pursuits and become self-supporting, would lead them into an agreement whereby they could be deprived of the one essential element necessary to make the purpose of the Government possible. The surrender of this water by the Indians, or the depriving of the Indians of it by the Government, would leave them upon a desert as arid and bare as the sands of the Sahara. This has not been the policy of the Government in dealing with the Indians.

In *Lone Wolf* v. *Hitchcock*, 187 U. S., 553–568, this court said:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians, of which complaint is made, and that the legislative branch exercised its best judgment in the premises.

The object and purpose of this agreement, and the intention of the parties as expressed thereunder, were clearly and forcibly stated by the Circuit Court of Appeals in its opinion rendered on the first hearing below. (*Winters* v. *U. S.*, 143 Fed., 740, 743.) The court said:

> We must presume that the Government and the Indians, in agreeing to the terms of the treaty, acted in the utmost good faith toward each other; that they both understood its meaning, purpose, and object; that

they know that "the soil could not be cultivated" without the use of water to "irrigate the same." Why was the northern boundary of the reservation located "in the middle of Milk River," unless it was for the purpose of reserving the right to the Indians to the use of said water for irrigation, as well as for other purposes?

It is admitted by appellants that "the irrigation and cultivation of the Indian lands is a policy of the Indian Department." The Indians in their untutored and uneducated minds might not have known the exact meaning of the word "irrigation" had it been used in the treaty, but in their wild and, to some extent, uncivilized condition they knew the use of forests, of lands, and of water. If they were to graze cattle and cultivate the soil, they knew it could not be done successfully without the use of water. They knew, as well as the officers of the Government, where the boundaries of their reservations were, and that their rights under the terms of the treaty extended to the middle of the channel of Milk River, and believed they had as much right to the water as to the land included in the boundaries for their permanent homes for the uses and purposes of the agreement made with the Government. The signing of the treaty was not an idle ceremony. The absence of the words "to irrigate their lands" did not abrogate and destroy their rights as guaranteed by the terms of the treaty. We are of the opinion that it was the intention of

the treaty to reserve sufficient waters of Milk River, as was said by the court below, "to insure to the Indians the means wherewith to irrigate their farms," and that it was so understood by the respective parties to the treaty at the time it was signed. In arriving at this conclusion we have followed the rule that should govern the courts in the construction of treaties made by the Government with the Indians.

V.

Even under the laws of Montana appellants are not entitled to the appropriation of the waters which they claim.

If it should be held that the foregoing contentions are not well taken and that the right to the use of this water for the Indian reservation depends solely upon the right acquired by the Indians under the agreement of 1888 to occupy the reservation bordering upon Milk River, it is submitted that under that agreement they acquired, as riparian proprietors, a right to the use of the waters bordering on the reservation which could not be obstructed by any subsequent riparian proprietor or appropriator of such water.

The material question on this alternative branch of the case resolves itself into the inquiry whether in 1888, under the laws of the Territory, a riparian proprietor under grant from the United States acquired right to the use of the flowing water superior to that of any subsequent adverse appropriation,

since such rights as were vested in the Indians as riparian proprietors under the agreement of 1888 certainly could not be divested under any legislation of the Territory or State subsequently enacted.

When the agreement of 1888 was made none of the appellants had made any appropriation whatever of the waters of this river for the purpose of irrigation or otherwise. Prior to that date all of the surrounding land upon which appellants subsequently made their entries having been included within the former Indian reservation and never thrown open to entry as part of the public domain, and no appropriation of water had been made thereon by other persons.

It appears, however, from a decision of the Supreme Court of the Territory of Montana, in *Thorp* v. *Freed* (1 Mont., 660), that under the laws of the Territory, as they then stood, substantially the California doctrine prevailed, namely, that while by prior appropriation a right might be acquired under the act of 1885 to the use of waters situated on the public lands of the United States which would be good against the United States and its subsequent grantees, nevertheless if the land was granted by the United States before such adverse appropriation of water on the public lands, the grantees' title was not subject to any subsequent appropriation by another party, and he acquired by reason of his riparian ownership a right to the use of the waters of the stream for

irrigation or other beneficial use which could not be taken away from him by any subsequent proprietor or appropriator. In this case, in construing the act of January 12, 1865, to protect and regulate the irrigation of lands in Montana Territory, which was passed by its first Territorial legislative assembly, and which remained on the statute books of Montana in substantially the same form until 1895, the court said:

> We therefore conclude that the doctrine that he who first appropriates the waters of a stream can hold the same as against subsequent riparian owners for the purposes of irrigation and agriculture is inapplicable to lands situated along the banks of a stream where title to such lands has passed from the Government to riparian owners, for the very act of transferring the title carries with it the freehold, and this includes the title to the water that flows over or along the boundary of the lands thus transferred, and the act of Congress of July 26, 1866, is not at all in conflict with this view of the case. That act is applicable to rights acquired while the title yet remains in the Government, and the occupants are mere tenants at will.

It would seem to follow under this construction of the Montana statute given by its Territorial court, which substantially assimilates the rule in the Territory of Montana to the California doctrine (*Lux* v. *Haggin*, 69 Cal., 255; *Long on Irri-*

gation, secs. 25, 29, 30), that the rights of riparian proprietors with which the Indians became vested in 1888 before any rights had been acquired by adverse appropriation of water on the public domain were not subject to be divested by any subsequent legislation of Montana purporting to give subsequent appropriators rights superior to those vested in earlier riparian proprietors.

Respectfully submitted.

J. A. VAN ORSDEL,
EDWARD T. SANFORD,
Assistant Attorneys-General.

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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 158.

HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLANTS IN REPLY TO SUPPLEMENTAL BRIEF.

EDWARD C. DAY,
JAMES A. WALSH,
Solicitors for Appellants.

CHAS. P. YOUNG CO., PRINTERS, 19 BEAVER ST., NEW YORK.

IN THE

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HENRY WINTERS, JOHN W. ACKER, CHRIS CRUSE, AGNES DOWNS, ET AL., APPELLANTS,

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THE UNITED STATES.

Appellants Reply to Supplemental Brief.

I.

THE NECESSARY PARTIES.

We will not attempt to review the authorities cited by counsel for Appellee in support of their contention. It is sufficient to say that there is a broad line of distinction between the cases cited in support of counsel's contention and the case at bar. In the cases cited by Appellee there were judgments that were joint and could not be separated or made several as to the different parties. The interests of the parties were joint and the judgments were joint judgments.

In Simpson *v.* Greeley, 20 Wall., 152, it was held that the interest was joint and the interest of all was affected, and in the other cases similar conditions existed.

In the case at bar the appellants' interests are not joint. It is not charged that they were joint trespassers or that they acted jointly, concurrently or with any concert of action to produce the results complained of. It is a suit to prevent the commission of a wrong; a wrongful

trespass; a wrongful invasion of complainant's rights. In this the several defendants cannot have any joint interest—cannot have a joint interest in the commission of a wrongful act. One cannot have any claim or interest in the wrongful acts committed by the other. If one is enjoined from committing an unlawful act he cannot have any interest in a right claimed by any party who shows or claims that he has a legal right to do the acts complained of. While a judgment may be against all, it is several as to each of the parties, and one party may show that he has a legal right to do the act and his right will not affect the rights of any others. None of the cases cited by Appellee were actions for *tort* or for the prevention of the commission of a wrong or other unlawful act.

In the case at bar the defendants against whom the decree was entered *pro confesso* by their failure to answer admitted committing the acts complained of and admitted that they were wrongful and unlawful. The appellants have no claim or interest in the wrongful acts the non-answering defendants confessed to having committed. They have no community of interest with them.

The appellants by their answers show that they severally did construct dams and reservoirs and diverted the waters mentioned in the bill of complaint under a claim of right, claiming that right under the Laws of the United States, the Laws of the State of Montana and the rules and decisions of its Courts and the customs of the country. They have shown a complete compliance with these laws, decisions and customs. They have shown that their acts were separate and that the water was diverted for the purpose of irrigating their several tracts of land which are owned in severalty by them. The defaulting defendants have not, and cannot, in any way, claim any interest in the rights thus claimed by the several appellants, nor can they be affected by any decision of the Court affecting the rights of these appellants. The reversal of the judgment and sending the cause back for trial on the merits cannot in any way prejudice

or affect the rights of the defaulting defendants. Hence, it was not necessary to make them parties to the appeal. They were not necessary parties to the suit.

In Brewster *v.* Wakefield, 22 How., 118, 129, the Court said:

> "Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in question should join in the appeal. They were not necessary parties in a proceeding to foreclose and none of them appeared in the suit to contest the claim of Wakefield, and if it had been otherwise, yet the question here is the amount of the debt due from the appellant; and in the case of Forgay *v.* Conrad, 6 How., 201, this Court decided that a defendant in equity whose interests is separate from that of the other defendants may appeal without them."

See also cases cited in our former brief and

Marsh *v.* Nichols, 120 U. S., 598;

Amadeo *v.* Northern Assurance Co., 201 U. S., 194, 200.

It is not charged in the bill of complaint that the defendants confederated or conspired together to do the acts complained of or acted jointly.

It is shown by the answer of these appellants that they acted separately and for the purpose of this case this allegation is taken as true.

In Chipman *v.* Palmer, 77 N. Y., 51, the Court said:

> "The injury was not caused by the act of the defendant alone or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewage from the defendant and other owners of lots into the creek and separately and independently of each other. The right of action arises from the discharge into the stream; the nuisance is only the consequence of the act. The liability commenced with the act of the defendant upon his own premises, and this act was separate and independent of and without regard to the act of others. The defendant's act being several when it was committed cannot be made joint because

> of the consequences which followed in connection with others who had done the same or similar act. It is true it is difficult to separate the injury, but that furnishes no reason why one joint *tort feasor* should be liable for the act of others who have no association and do not act in concert with him. If the law were otherwise the one who did the least might be made liable for the damages of others far exceeding the amount for which he was chargeable without any means to enforce contribution or to adjust the amount among different parties." * * * "There must be a concert of action and co-operation to make several persons jointly liable."

While that was an action at law to recover damages the same rule applies where the suit is in equity to enjoin the commission of a *tort*. The acts are separate. One defendant has not and cannot have any interest in the acts of another in committing a *tort*, and their acts are several.

See Cooley on *Torts*, 226, 227, 3rd Ed.

Even if a trespass is joint and the parties are joint *tort feasors* the liability would be several. The parties might file several answers.

Lovejoy *v.* Murray, 3 Wall., 1;
Sessions *v.* Johnson, 95 U. S., 348.

We respectfully submit that there is no defect of parties, that those not joined have no interest and cannot be in any way affected by the decision in this cause. They are not necessary parties to the appeal.

II.

The Rule Contended for by the Appellee, if Held Valid, Would Affect All Public Lands in the United States and Nullify the Act of Congress Permitting Waters on the Public Lands to be Appropriated and Applied to a Beneficial Use, if the Waters Flowed Past a Reservation.

All public lands were at one time Indian country, and as they were opened for settlement the waters were appropriated where necessary for irrigation.

It is contended that the rights claimed by the Government in its bill of complaint are not based upon any appropriation made under the laws or customs of the State of Montana.

An examination of the bill of complaint will show that it is based wholly upon appropriations made under the laws of the State of Montana. It is true these laws are not pleaded, but it is not necessary to do so; the Court will take judicial notice of them. It is alleged that the Government is the owner of the lands and that on certain dates it appropriated, diverted and conveyed certain waters and applied them to a beneficial use. These allegations are certainly attempting to set up a right under the laws of the State of Montana. It is nowhere alleged that the Government in any way reserved these waters for use upon the reservation or for any other purpose, nor are there any rights claimed as riparian proprietors. The issues made by the bill and answer bring the case within the Laws of Montana and present issues to determine the respective rights of the parties upon evidence.

III.

THE SUBJECTS DISCUSSED IN THE THIRD AND FOURTH SUBDIVISIONS OF THE SUPPLEMENTAL PROOF WERE DISCUSSED IN OUR FORMER BRIEF. WE WILL THEREFORE NOT ENTER INTO ANY EXTENDED DISCUSSION OF THE SUBJECTS.

In the Leavenworth case and Missouri & Pacific Railway case there were express reservations reserving all lands theretofore reserved for any purpose. The parties sought to claim lands that were embraced within the reservations. In the case at bar the appellants have not sought to invade the reservation for any purpose, but their appropriations were made upon the public domain.

The question of interfering with the navigability of a stream is not involved as it was in the Rio Grande case. It averred in the bill of complaint and conceded that the Milk River is a non-navigable stream.

The question here presented was not presented in that case or the Gutierres case, 188 U. S.

The rights claimed by appellants are the rights based upon the laws of the United States and the State of Montana and its rules, customs and decisions. They accepted the grant given by the Government and in good faith went upon the lands, expended large amounts of money and diverted and appropriated these waters long before the Government asserted any title thereto, and they should not be deprived of the rights and property thus acquired. The Government cannot, after they have accepted the grant, expended large amounts of money and established civilized communities in that country, restrict the terms of the grant, or withdraw the waters from appropriation under the claim that it reserved those waters for its own use.

It is contended that the same rule would apply in this case as it would if the contest were between the Indians and the Government.

It was a contest between the Indians and the Government in the Choctaw case, cited in our former brief, and the Court held that it could not construe the agreement in favor of the Indians when its terms were clear and unambiguous, and that if any wrong were done the Indians it would be a matter for the legislative department of the Government to rectify.

The appellants are in a stronger position than the Government would be in such a contest, because they have acted in good faith in accepting the grant of the Government and expended large amounts of money, and it would be inequitable for the Government to be permitted to withdraw the grant and deprive them of their property.

The case of Storey v. Wolverton, 31 Mont., 346, does not decide any point in issue in this case. In that case the rivers were on the reservation and the Government used the water, and it was held that when it ceased using the water it abandoned the same and it became subject to appropriation of any one who sought to take it.

In the case at bar the Government did not assert a right to the use of the water until after the appellants appropriated it, and under the rule announced in that case it was open to appropriation.

IV.

It is contended that the appellants have no right to the use of the water under the laws ofthe State or territory of Montana. They have pleaded all facts showing valid appropriations under those laws. If riparian rights existed, which we do not admit, the facts pleaded by appellants would entitle them as riparian proprietors to a reasonable use of the waters as against the Government. Under the doctrine of riparian proprietorship no priority is recognized, but the courts make an equitable distribution according to the rights of the parties.

See cases cited in our former brief.

The Government as the proprietor of lands is subject to the laws of the State in which the lands are situated, the same as an individual.

Hardin *v.* Shedd, 190 U. S., 508.

Counsel quotes from Thorpe *v.* Freed to prove that riparian rights are recognized in Montana. In that case the question of riparian rights was not before the Court. The quotation is not from the opinion of the Court but from a discussion by Judge Wade of a subject that was not before the Court for its decision.

The rule stated by Judge Wade has never been recognized by the courts of Montana.

We respectfully submit that the judgment should be reversed and the case remanded for trial upon the merits.

Respectfully submitted,

EDWARD C. DAY,
JAMES A. WALSH,
Solicitors for Appellants.

NOTE.—Mr. Day did not have an opportunity to examine the supplemental brief or prepare a brief in reply.